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Supreme Court, U. S.
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APPENDIX

In the Supreme Court of the United States

October Term, 1972

72-459

Nos. 459, 620

72-620

GRACE SLOAN, as State Treasurer of the Commonwealth of Pennsylvania,

and

JOSE DIAZ and ENILDA DIAZ, His Wife, WILLIAM ZIMMERSPITZ and NANCY ZIMMERSPITZ, His Wife, F. Carl KRETZMANN and KATHERYN L. KRETZMANN, His Wife, ARTHUR HARVEY and MURIEL HARVEY, His Wife, DANIEL F. X. POWELL and ANNA T. POWELL, His Wife, SETH W. WATSON, JR., and ANNE P. WATSON, His Wife, and HENRY E. CROUTER,

Appellants

v.

ALTON J. LEMON, NEAL F. BRACKEN, and BENJAMIN S. LOWENSTEIN,

Appellees

On Appeal From the United States District Court for the Eastern District of Pennsylvania

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NOTICE OF APPEAL (DIAZ ET AL.) FILED AUGUST 8, 1972

NOTICE OF APPEAL (SLOAN) FILED AUGUST 14, 1972

NOTICE OF APPEAL (CROUTER) FILED AUGUST 21, 1972

PROBABLE JURISDICTION NOTED JANUARY 22, 1973

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1972
Nos. 459, 620

GRACE SLOAN as State Treasurer of the Commonwealth of Pennsylvania

and

JOSE DIAZ and ENILDA DIAZ, his wife, WILLIAM ZIMMERSPITZ and NANCY ZIMMERSPITZ, his wife, F. CARL KRETZMANN and KATHERYN L. KRETZMANN, his wife, ARTHUR HARVEY and MURIEL HARVEY, his wife, DANIEL F. X. POWELL and ANNA T. POWELL, his wife, SETH W. WATSON, JR., and ANNE P. WATSON, his wife, and HENRY E. CROUTER,

Appellants

v.

ALTON J. LEMON, NEAL F. BRACKEN, and BENJAMIN S. LOWENSTEIN,

Appellees

On Appeal from the United States District Court for the Eastern District of Pennsylvania

---

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

September 13, 1971, Complaint filed.

November 12, 1971, Defendant Sloan's Motion To Dismiss the Second and Third Counts of the Complaint for Failure of Plaintiffs To Have Standing To Sue Thereunder filed.

November 12, 1971, Defendant Sloan's Motion To Dismiss Plaintiffs' Complaint for Failure To State a Claim on Which Relief Can Be Granted filed.

December 21, 1971, Motion of Henry E. Crouter To Intervene as Party Defendant filed.

December 27, 1971, Order Granting Motion of Henry E. Crouter To Intervene as Party Defendant filed.

December 28, 1971, Motion of Jose Diaz et al. To Intervene as Parties Defendant filed.

January 4, 1972, Motion of Defendant Crouter, Under Federal Rules of Civil Procedure 12, To Strike Paragraph 10 of Plaintiffs' Complaint and To Dismiss the Complaint filed.

January 20, 1972, Order Granting Motion of Jose Diaz et al., To Intervene as Parties Defendant filed.

January 27, 1972, Motion of Jose Diaz et al., To Dismiss Plaintiffs' Complaint for Failure To State a Claim Upon Which Relief Can Be Granted filed.

January 27, 1972, Motion of Jose Diaz et al., To Dismiss the Second and Third Counts of the Complaint for Failure of Plaintiffs To Have Standing To Sue Thereunder filed.

April 6, 1972, Opinion and Order Denying Defendants' Motions To Dismiss the Complaint filed.

April 28, 1972, Order Granting Motions of Defendants To Dismiss Counts 2 and 3 of the Plaintiffs' Complaint filed.

May 1, 1972, Answer of Defendant Sloan to Plaintiffs' Complaint filed.

May 1, 1972, Answer of Jose Diaz et al., to Plaintiffs' Complaint filed.

May 1, 1972, Answer of Defendant Crouter to Plaintiffs' Complaint filed.

May 3, 1972, Motion of Intervener Defendants Seth W. Watson, Jr., and Anne P. Watson for Summary Judgment and Affidavit filed.

May 3, 1972, Plaintiffs' Motion for Summary Judgment filed.

May 11, 1972, Affidavit of Neal F. Bracken filed.

June 21, 1972, Order Denying Motion of Intervenors Seth W. Watson, Jr. and Ann P. Watson for Summary Judgment and Limiting Arguments to Certain Issues filed.

July 13, 1972, Parent Application Form, Pennsylvania Parent Assistance Authority filed.

July 21, 1972, Order Granting Plaintiffs' Motion for Summary Judgment filed.

July 31, 1972, Motion of Defendant Crouter To Alter or Amend the Judgment Under Rule 59(e) filed.

August 1, 1972, Motion of José Diaz et al., for Amended Order filed.

August 3, 1972, Order Denying Motion of Defendant Crouter To Alter or Amend the Judgment Under Rule 59(e) filed.

August 4, 1972, Order Denying Motion of Jose Diaz et al., for Amended Order filed.

January 22, 1973, Order Noting Probable Jurisdiction and Consolidating Cases filed.

COMPLAINT

(Title Omitted in Printing)

I. STATEMENT AS TO JURISDICTION

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1. This is a civil action brought by the plaintiffs, on their own behalf and on behalf of all others similarly situated, for a temporary and permanent injunction against the allocation and use of funds of the Commonwealth of Pennsylvania to support and finance in whole or in part the operations of and instruction in a) private schools owned and controlled by religious organizations and organized for and engaged in the practice, propagation and teaching of particular religions, and b) private schools whose policies and practices, by purpose or effect, exclude or restrict admission by reason of race or religion; and to declare such use violative of the First and Fourteenth Amendments to the Federal Constitution.

2. Jurisdiction is conferred upon this Court pursuant to Title 28, U.S.C., Sections 1331, 1343(3), 2201 and 2202.

3. The amount in controversy in this suit, exclusive of interest and costs, is in excess of Ten Thousand ($10,000) Dollars, as more fully appears hereinafter.

4. Each of the plaintiffs is a citizen, resident and taxpayer in the United States and in the Commonwealth of Pennsylvania, and resides in the Eastern District of Pennsylvania. Each has purchased and continues to purchase cigarettes in the Commonwealth of Pennsylvania and has paid the tax due pursuant to the Act of July 22, 1970 (P. L. 513) known as the "Pennsylvania Cigarette Tax Act."

5. Plaintiff Alton Lemon is a parent of a Negro child attending a public school in Pennsylvania and sues in his own behalf and on behalf of others similarly situated.

6. It is against the religious conscience of each of the plaintiffs to be forced by operation of the taxing power to contribute to the propagation of religion or for the support of sectarian schools or of other schools which by purpose or effect exclude or restrict admission on the basis of race or religion.

7. Defendant Grace Sloan is State Treasurer of the Commonwealth of Pennsylvania and is sued in that capacity.

II. FACTUAL ALLEGATIONS

8. On August 27, 1971, the Governor of the Commonwealth of Pennsylvania signed into law Act 92 of the Laws of Pennsylvania, 1971, known as the "Parent Reimbursement Act for Nonpublic Education," hereinafter referred to as the Act. (The text

of the Act is set forth herein as Appendix A from House Bill 1379, Printer's No. 1779.) The Act appropriates 23% of the Pennsylvania Cigarette Tax revenues for reimbursement of tuition payments to parents of children attending nonpublic elementary schools in the amount of seventy-five dollars ($75) per year per child and to parents of children attending nonpublic secondary schools in the amount of one hundred and fifty dollars ($150) per year per child.

9. The Pennsylvania Cigarette Tax revenues are the sole property of the Commonwealth of Pennsylvania.

10. The Act on its face and as construed and applied by the defendant authorizes and directs payment for the tuition of students in educational institutions which (1) are controlled by churches or religious organizations, (2) have as their purpose the teaching, propagation and promotion of a particular religious faith, (3) conduct their operations, curriculums and programs to fulfill that purpose, (4) impose religious restrictions on admissions, (5) require attendance at instruction in theology and religious doctrine, (6) require attendance at or participation in religious worship, (7) are an integral part of the religious mission of the sponsoring church, (8) have as a substantial or dominant purpose the inculcation of religious values, (9) impose religious restrictions on faculty appointments, or (10) impose religious restrictions on what the faculty may teach.

11. The Act on its face and as construed and applied by the defendant authorizes and directs pay-

ments for the tuition of students in educational institutions which by purpose or effect segregate students by race, thereby perpetuating and promoting the segregation of races and two separate school systems in Pennsylvania—a public school system predominantly black, poor and inferior and a private subsidized school system predominantly white, affluent and superior.

12. Unless enjoined by this Court, the defendant will pay all or part of the sums appropriated by the Act for the payment of tuition at the aforesaid nonpublic schools and will in the future continue to pay large sums in effectuation of the purposes of the Act.

III. CAUSES OF ACTION

13. *First Count:* The Act on its face and as construed and applied by the defendant is a law respecting an establishment of religion in violation of the First and Fourteenth Amendments to the Constitution of the United States in that it (a) finances religious instruction and worship; (b) has as its purpose the advancement of religion; (c) has as its primary effect the advancement of religion; (d) gives rise to excessive governmental involvement in and entanglement with religion; (e) gives rise to and intensifies political fragmentation and divisiveness on religious lines, and (f) prefers and strengthens those religions and sects which choose to or can afford to

operate a parochial system of education over those which do not or cannot.

14. *Second Count:* The Act on its face and as construed and applied by the defendant does and will prohibit the free exercise of religion in violation of the First and Fourteenth Amendments to the Constitution of the United States in that it (a) constitutes compulsory taxation for the support of religion, and (b) discriminates against and weakens those religions and sects which do not choose to or cannot afford to operate a parochial system of education in relation to those which do operate such schools.

15. *Third Count:* The Act on its face and as construed and applied by the defendant violates the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States in that it perpetuates and promotes the segregation of races.

IV. OTHER ALLEGATIONS

---

16. This suit involves a genuine case or controversy between the plaintiffs and the defendant.

17. The plaintiffs have no plain, speedy or adequate remedy at law and will suffer irreparable injury unless a preliminary and permanent injunction is granted.

V. PRAYERS FOR RELIEF

18. The plaintiffs pray that the following relief be granted:

(1) That a three-judge court be convened as provided in Title 28, Sections 2281 and 2283 of the United States Code to declare unconstitutional and enjoin the enforcement of the Pennsylvania Parent Reimbursement Act for Nonpublic Education as hereinbefore set forth.

(2) That the defendant be enjoined from paying any funds of the Commonwealth of Pennsylvania pursuant to the Act or otherwise, directly, or by way of reimbursement, for tuition at schools which (1) are controlled by churches or religious organizations, (2) have as their purpose the teaching, propagation and promotion of a particular religious faith, (3) conduct their operations, curriculums and programs to fulfill that purpose, (4) impose religious restrictions on admissions, (5) require attendance of students at instruction in theology or religious doctrine, (6) require attendance at or participation in religious worship, (7) are an integral part of the religious mission of the sponsoring church, (8) have as a substantial or dominant purpose the inculcation of religious values, (9) impose religious restrictions on faculty appointments, (10) impose religious restrictions on what the faculty may teach, or (11) by purpose or effect, segregate students by race.

(3) That a preliminary injunction pending the trial of the issues be granted against the defendant for the relief sought herein.

(4) That the plaintiffs be granted such other and further relief as the Court may deem just and proper.

September , 1971

Mann and Ungar
By: Theodore R. Mann
1845 Walnut Street
Philadelphia, Pa. 19103
Leo Pfeffer
15 East 84th Street
New York, N. Y. 10028
Attorneys for Plaintiffs

COMPLAINT—APPENDIX A

[Appendix A is the text of the Act herein challenged. It is found as Appendix A to the Opinion and Order Denying Defendants' Motions To Dismiss the Complaint.]

DEFENDANT'S MOTION TO DISMISS THE SECOND AND THIRD COUNTS OF THE COMPLAINT FOR FAILURE OF PLAINTIFFS TO HAVE STANDING TO SUE THEREUNDER

(Title Omitted in Printing)

The Defendant respectfully moves the Court to dismiss the Second and Third Counts of the Plaintiffs' Complaint on the ground that Plaintiffs do not have standing to sue thereunder.

In support thereof, Defendant assigns the following reasons:

I.

Second Count

---

1. The Complaint fails to allege facts sufficient to show that any of the Plaintiffs have religious beliefs, what such beliefs are, and to what extent, if any, Act 92 interferes with the free exercise of any religious belief of any Plaintiff or with any religious practice which he may have.

II.

Third Count

---

2. The issue of Plaintiff's standing to sue under the Equal Protection Clause is res judicata by virtue

of the decision of this Court in Lemon v. Kurtzman, 310 F. Supp. 35, 43 (1969), in which the Plaintiff herein, Alton J. Lemon, was a party plaintiff and in which the Defendant herein, Grace Sloan, was a party defendant.

3. In the alternative: (a) the Complaint fails to allege facts sufficient to show that any individual Plaintiff suffers, or is threatened by, any discrimination; (b) the Complaint fails to allege facts sufficient to show that Plaintiff Alton J. Lemon has an interest, either as a parent, or as a Negro parent, or as a parent of a child attending a public school in Pennsylvania, sufficient to entitle him to sue either on his own behalf or on behalf of all other persons similarly situated.

WHEREFORE, the Defendant respectfully prays the Court to enter an Order dismissing counts Second and Third of the Plaintiffs' Complaint.

Respectfully submitted,

J. Justin Blewitt, Jr.
Deputy Attorney General

J. Shane Creamer
Attorney General

Attorneys for Defendant

State Capitol
Harrisburg, Pa.

DEFENDANT'S MOTION TO DISMISS PLAINTIFFS' COMPLAINT FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

(Title Omitted in Printing)

Defendant respectfully moves the Court to dismiss Plaintiffs' Complaint and to enter a judgment of dismissal in Defendant's favor. In support thereof, Defendant assigns the following reasons:

I.

First Count

Paragraph 13—Establishment of Religion

1. The bare conclusory allegations, "(a)", "(b)", "(c)", "(d)", "(e)", and "(f)", that the Act is unconstitutional on its face and as applied, fail to state any claim since the Act has solely the public and secular legislative purpose and effect of providing financial assistance to parents in the educating of their children in compliance with the compulsory school attendance requirements of law.

2. The Complaint fails to allege any facts sufficient to show that the Establishment Clause allegations are ripe for decision.

II.

Second Count

Paragraph 14—Free Exercise

3. The allegation, "(a)", that the Act is unconstitutional on its face and as applied because it "con-

stitutes compulsory taxation for the support of religion" is insufficient as a matter of law, in that the Act achieves solely the public and secular legislative purpose of providing financial assistance to parents and does not require or permit support of religion.

4. The Complaint fails to allege facts sufficient to show that the Act in any way "discriminates against or weakens" any religion or sect.

5. The Complaint fails to show that the Free Exercise allegations are ripe for decision.

III.

Third Count

Paragraph 15—Equal Protection of the Laws

6. The Complaint fails to allege that the Act on its face or as applied, either expressly or by implication, requires, permits or results in any discriminatory State action.

7. The Complaint fails to allege, either expressly, or by implication, that the Act requires or permits invidious classification or discrimination of any kind based upon race.

8. The allegation of the Complaint that the Act authorizes payments for the tuition of students in educational institutions which by purpose or effect segregate students by race fails to constitute an allegation of a denial of the equal protection of the laws.

9. The Complaint fails to allege facts sufficient to show that the Equal Protection claim is ripe for decision.

WHEREFORE, the Defendant respectfully prays the Court to enter an Order dismissing Plaintiffs' Complaint for failure to state a claim upon which relief can be granted and to enter a Judgment of Dismissal in Defendant's favor.

Respectfully submitted,

J. Justin Blewitt, Jr.
Deputy Attorney General

J. Shane Creamer
Attorney General

Attorneys for Defendant

State Capitol
Harrisburg, Pa.

MOTION OF HENRY E. CROUTER TO INTERVENE AS PARTY DEFENDANT

(Title Omitted in Printing)

Henry E. Crouter, by his attorneys, Duane, Morris & Heckscher, moves for leave to intervene as a defendant in the above action and in support thereof, assigns the following reasons:

1. Petitioner is a resident of the Commonwealth of Pennsylvania and a parent of three children who are residents of the Commonwealth of Pennsylvania. Two of Petitioner's children are enrolled as students in Springside School, Philadelphia, Pennsylvania, and the third child is enrolled as a student in Chestnut Hill Academy, Philadelphia, Pennsylvania. Springside School and Chestnut Hill Academy are each nonpublic independent schools, each qualifies as a school within the Commonwealth of Pennsylvania in which a resident of the Commonwealth may fulfill the compulsory school attendance requirements, and each meets the requirements of Title VI of the Civil Rights Act of 1964 (Public Law, 88-352).

2. Petitioner is a parent within the meaning of §3(1) of the Act, and as such, is eligible for tuition reimbursement payments under the Act.

3. Petitioner intends to apply for reimbursement payments pursuant to the Act, at the time prescribed in the Act.

4. Plaintiffs' Complaint alleges that the Act is unconstitutional both on its face and as applied and seeks to have the Act declared unconstitutional and to enjoin the payment of any monies to parents of students enrolled in nonpublic schools under the Act.

5. Petitioner has an interest relating to the property which is the subject matter of this action and is so situated that the disposition of the action will, as a practical matter, impair or impede his ability to protect such interests unless petitioner is granted leave to intervene.

6. Petitioner has, or may have, defenses to plaintiffs' claims which present both questions of law and of fact which are common to the above action.

7. As a parent eligible for reimbursement under the Act, and as a parent of children attending nonpublic, independent schools in the Commonwealth, petitioner has claims and defenses separate and distinct from those of the sole party defendant, the Treasurer of the Commonwealth of Pennsylvania. There is presently no party of record who can adequately assert the parental rights, claims and defenses of petitioner. Unless petitioner is allowed to intervene, his rights will be disposed of without adequate representation.

8. Granting the within Petition will not delay or prejudice the adjudication of the rights of any original party.

9. Petitioner is authorized to state that the defendant has no objection to the Motion To Intervene.

Henry T. Reath
Robert L. Pratter

for Duane, Morris & Heckscher
Attorneys for Petitioner

ORDER

(Title Omitted in Printing)

AND NOW, this 27th day of December, 1971, the Court hereby grants the Motion of Henry E. Crouter To Intervene as a Party Defendant and directs that he file a responsive pleading to the Complaint in this action within ten days from the date of this Order.

Joseph S. Lord, III,
J.

MOTION OF JOSE DIAZ, ET AL. TO INTERVENE AS PARTIES DEFENDANT

(Title Omitted in Printing)

Jose Diaz and Enilda Diaz, his wife, William Zimmerspitz and Nancy Zimmerspitz, his wife, F. Carl Kretzmann and Katheryn L. Kretzmann, his wife, Arthur Harvey and Muriel Harvey, his wife, Daniel F. X. Powell and Anna T. Powell, his wife, and Seth W. Watson, Jr. and Anne P. Watson, his wife, hereinafter collectively designated the "Interveners", by their attorneys, respectfully move this Court pursuant to Rule 24(a) of the Federal Rules of Civil Procedure, for permission to intervene as parties defendant in this action. In support thereof, the Interveners assign the following reasons:

1. Each of the Interveners is a taxpayer and a citizen of the United States of America and a resident of the Commonwealth of Pennsylvania, living in the Eastern District of Pennsylvania.

2. Each of the Interveners is a taxpayer and citizen of the Commonwealth of Pennsylvania.

3. Each of the Interveners is a "parent" of one or more "students" who are enrolled in "nonpublic schools," as those terms are defined in Act 92 of August 27, 1971 (hereinafter designated the "Act"), the constitutionality of which is being challenged in this action.

4. Jose Diaz and Enilda Diaz, his wife, reside at 2539 North Second Street, Philadelphia, Pennsylvania. They are the parents of Dalila Diaz, age 12, Jose Diaz, Jr., age 8, and Sergio Diaz, age 7, all of whom are students currently enrolled in a nonpublic school. Jose Diaz is employed as a shipping clerk; Enilda Diaz has part-time employment. Jose and Enilda Diaz are the sole support of their family, which consists of eight persons (Mr. and Mrs. Diaz, five minor children and the mother of Enilda Diaz). They contribute monthly to the support of Mr. Diaz' parents, who reside in Puerto Rico.

5. William Zimmerspitz and Nancy Zimmerspitz, his wife, reside at 937 East Dorset Street, Philadelphia, Pennsylvania. They are the parents of Rochelle Zimmerspitz, age 13, who is enrolled in a nonpublic school. Mr. Zimmerspitz is self-employed in South Philadelphia. He is the sole support of his family, which consists of four persons (Mr. and Mrs. Zimmerspitz and two minor children).

6. F. Carl Kretzmann and Katheryn L. Kretzmann, his wife, reside at 3110 Ryan Avenue, Philadelphia, Pennsylvania. They are the parents of Deborah L. Kretzmann, age 13, who is a student enrolled in a nonpublic school. Mr. Kretzmann is employed as a principal and school teacher; Mrs. Kretzmann is employed as a secretary. F. Carl and Katheryn Kretzmann are the sole support of their family, which includes five minor children.

7. Arthur Harvey and Muriel Harvey, his wife, reside at 1226 N. Allison Street, Philadelphia, Penn-

sylvania. They are the parents of Craig Byron Chester, age 13, who is a student enrolled in a nonpublic school. Mr. Harvey is employed as a clerk in the United States Postal Service. He is the sole support of his family, which consists of three persons (Mr. and Mrs. Harvey and their son).

8. Daniel F. X. Powell and Anna T. Powell, his wife, reside at 7933 Williams Avenue, Philadelphia, Pennsylvania. They are the parents of Marianne T. Powell, age 12, Kathleen A. Powell, age 9 and Daniel F. X. Powell, Jr., age 8, all of whom are enrolled in a nonpublic school. Mr. Powell is employed by Allstate Insurance Company, and is the sole support of his family, which consists of six persons (Mr. and Mrs. Powell and four minor children).

9. Seth W. Watson, Jr. and Anne P. Watson, his wife, reside at 246 Kent Road, Wynnewood, Pennsylvania. They are the parents of Seth W. Watson, III, age 15, Ellen P. Watson, age 11, and John F. Watson, age 10, all of whom are enrolled in nonpublic schools. Mr. Watson is employed as an attorney, and is the sole support of his family, which consists of five persons (Mr. and Mrs. Watson and three minor children).

10. Each of the Interveners, as parents, belongs to the class of persons designated in the Act as the beneficiaries thereof and each intends to seek reimbursement thereunder.

11. The Interveners, as parents, have interests relating to the property which is the subject of this action, and are so situated that the disposition of this action, may, as a practical matter impair or impede their ability to protect those interests.

12. The Interveners, as parents, by virtue of the rights conferred upon them by this Act, have claims and defenses separate and distinct from those of the sole party defendant, Grace Sloan, the Treasurer of the Commonwealth of Pennsylvania. There is presently no party of record who can adequately assert the parental and personal rights, and the claims and defenses of the Interveners and their children. Unless this Court grants Interveners' Motion, their rights will be disposed of without adequate representation.

13. Granting Interveners' Motion will not delay this action nor will it prejudice the adjudication of the rights of any of the original parties.

14. Interveners attach hereto as Exhibit "A" the pleading which they propose to file which sets forth the defense for which this intervention is sought.

WHEREFORE, Jose Diaz, Enilda Diaz, William Zimmerspitz, Nancy Zimmerspitz, F. Carl Kretzmann, Katheryn L. Kretzmann, Arthur Harvey, Muriel Harvey, Daniel F. X. Powell, Anna T. Powell, Seth W. Watson, Jr. and Anne P. Watson respectfully pray this Court to permit them to intervene as parties

defendant in this action pursuant to Rule 24(a) of the Federal Rules of Civil Procedure.

William B. Ball
Attorney for Jose Diaz, Enilda Diaz, Seth W. Watson, Jr. Anne P. Watson

Joseph G. Skelly
Attorney for William Zimmerspitz, Nancy Zimmerspitz, Arthur Harvey, Muriel Harvey

James E. Gallagher, Jr.
Attorney for Daniel F. X. Powell, Anna T. Powell

C. Clark Hodgson, Jr.
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MOTION OF DEFENDANT CROUTER, UNDER FEDERAL RULES OF CIVIL PROCEDURE 12, TO STRIKE PARAGRAPH 10 OF PLAINTIFFS' COMPLAINT AND TO DISMISS THE COMPLAINT

(Title Omitted in Printing)

MOTION TO STRIKE

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1. Intervenor Defendant, by his attorneys, moves to strike paragraph 10 of Plaintiffs' Complaint pursuant to Federal Rules of Civil Procedure 12(f) upon the following grounds:

a. The allegations of paragraph 10 relate solely to allegations concerning the characteristics and alleged religious practices of "educational institutions", and as such, are clearly immaterial. Act 92 does not authorize and direct payment for the tuition of students in any particular kind of educational institution other than a nonpublic school as defined in §3(2) of the Act:

> "Nonpublic school" means any school, other than a public school, within the Commonwealth of Pennsylvania, wherein a resident of the Commonwealth may legally fulfill the compulsory school attendance requirements of law and which meets the requirements of Title VI of the Civil Rights Act of 1964 (Public Law 88-352).

b. Unless the allegations of paragraph 10 are stricken, inquiry would have to be made of eligible parents to discover the religious practices or religious character, if any, of the schools to which the parents chose to send their children. Such inquiry is not required under the Act, and furthermore, is beyond the scope of judicial or executive inquiry as violative of the parents' and their children's rights under the Constitution of the United States and Constitution of the Commonwealth of Pennsylvania.

MOTION TO DISMISS

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2. Intervenor Defendant, by his attorneys, moves the Court to dismiss the Plaintiffs' Complaint for failure to state a claim upon which relief can be granted and for lack of standing, and in support thereof, Defendant assigns the following reasons:

a. *First Count—Establishment of Religion—Motion To Dismiss for Failure To State a Claim*

The First Count of Plaintiffs' Complaint fails to state a claim upon which relief can be granted under the Establishment clause of the First Amendment in that:

(1) The Complaint fails to allege any facts to support the bare conclusory allegations in paragraph 13 that the Act is unconstitutional on its face and as applied.

(2) Contrary to Plaintiffs' allegations, the Act has solely the public and secular legislative

purpose and effect of giving parents financial assistance in educating their children in compliance with the compulsory school attendance requirements.

b. *Second Count—Free Exercise of Religion—Motion To Dismiss for Lack of Standing*

Plaintiffs do not have any legally recognizable interest under the Free Exercise Clause of the First Amendment in that the Complaint fails to establish that any of the Plaintiffs have religious beliefs, what such beliefs are, and to what extent, if any, Act 92 interferes with the free exercise of religion of any Plaintiff or with any religious practices of any Plaintiff.

c. *Second Count—Free Exercise of Religion—Motion To Dismiss for Failure To State a Claim*

Plaintiffs' Complaint fails to state a claim upon which relief can be granted under the Free Exercise Clause of the First Amendment in that the Complaint does not allege any facts that demonstrate that the Act, on its face, or as applied, coerces plaintiffs as individuals in the practice of their religion, constitutes compulsory taxation for the support of religion, or unlawfully discriminates against any religion.

d. *Third Count—Equal Protection of the Laws—Motion To Dismiss for Lack of Standing*

Plaintiffs do not have any legally recognizable interest under the Equal Protection Clause of the Fourteenth Amendment in that:

(1) The issue of Plaintiffs' standing to sue under the Equal Protection Clause has been de-

cided adversely to Plaintiffs' position and is res judicata by virtue of the decision in Lemon v. Kurtzman, 310 F. Supp. 35, 43 (1969) in which the Plaintiff herein, Alton J. Lemon, was a party Plaintiff, and in which the Defendant herein, Grace Sloan, was a party Defendant;

(2) There are no allegations to support the existence of any legally recognizable interest of the Plaintiffs' under the Equal Protection Clause of the Fourteenth Amendment;

(3) The Complaint fails to establish that Plaintiffs have a sufficient stake, or adverse interest under the Equal Protection Clause to challenge the Act as violative of the Equal Protection Clause of the Fourteenth Amendment; and

(4) The Complaint fails to establish that Plaintiff, Alton J. Lemon, has an interest, either as a parent, as a Negro parent, or as a parent of a child attending a public school in Pennsylvania, sufficient to entitle him to sue on behalf of all other persons similarly situated, or that the other Plaintiffs have any interest sufficient to entitle them to sue on behalf of other persons similarly situated.

d. *Third Count—Equal Protection of the Laws—Motion To Dismiss for Failure To State a Claim*

The Complaint fails to state a claim upon which relief can be granted under the Fourteenth Amendment, Equal Protection Clause in that:

(1) The Complaint fails to allege that the Act, on its face, either expressly or by implica-

tion, requires or permits any discriminatory State action.

(2) The Complaint fails to establish that the Act, on its face or as applied, results in any discriminatory State action.

(3) The Complaint fails to allege, either expressly or by implication, that the Act requires or permits an invidious classification or discrimination of any kind based upon race.

(4) The allegations of the Complaint that the Act authorizes reimbursement payments to parents whose children attend schools which are "predominantly white, affluent and superior . . ." fails to constitute an allegation of denial of the equal protection of the laws to Plaintiffs.

WHEREFORE, Intervenor Defendant prays that the Court strike paragraph 10 of Plaintiffs' Complaint, and dismiss Plaintiffs' Complaint.

Henry T. Reath
Robert L. Pratter
for Duane, Morris & Heckscher
Attorneys for Intervenor Defendant

ORDER
(Title Omitted in Printing)

AND NOW, this 19th day of January, 197—, upon consideration of the motion of Jose Diaz, et al. for

permission to intervene as parties defendant pursuant to Rule 24(a) of the Federal Rules of Civil Procedure, and the Stipulation of counsel indicating no objection to the granting of the motion, and it appearing to the Court that the Interveners claim an interest relating to the property which is the subject of this action and are so situated that the disposition of this action may as a practical matter impair or impede their ability to protect that interest, it is ORDERED, ADJUDGED and DECREED that the motion of Jose Diaz, et al. be and it is hereby GRANTED.

It is FURTHER ORDERED that Jose Diaz, et al. file a responsive pleading to the Complaint within ten days from the date of this Order.

By the Court:

Joseph S. Lord, III,
J.

MOTION OF JOSE DIAZ, ET AL. TO DISMISS PLAINTIFFS' COMPLAINT FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

(Title Omitted in Printing)

Defendants, Jose Diaz, Enilda Diaz, William Zimmerspitz, Nancy Zimmerspitz, F. Carl Kretzmann, Katheryn L. Kretzmann, Arthur Harvey, Muriel Harvey, Daniel F. X. Powell, Anna T. Powell, Seth W. Watson, Jr. and Anne P. Watson, respectfully move this Court to dismiss plaintiffs' complaint and to enter a judgment of dismissal in defendants' favor. In support thereof, defendants assign the following reasons:

I.

First Count

Paragraph 13—Establishment of Religion

1. The bare conclusory allegations in paragraph 13, "(a)", "(b)", "(c)", "(d)", "(e)", and "(f)", that the Act is unconstitutional on its face and as applied, fail to state any claim since the Act has solely the public and secular legislative purpose and effect of providing financial assistance to parents in the educating of their children in compliance with the compulsory school attendance requirements of law.

II.

Second Count

Paragraph 14—Free Exercise

2. The allegation of paragraph 14(a), that the Act is unconstitutional on its face and as applied because it "constitutes compulsory taxation for the support of religion" is insufficient as a matter of law, in that the Act achieves solely the public and secular legislative purpose of providing financial assistance to parents and does not require or permit support of religion.

3. The complaint fails to allege facts sufficient to show that the Act in any way "discriminates against or weakens" any religion or sect.

III.

Third Count

Paragraph 15—Equal Protection of the Laws

4. The complaint fails to allege that the Act on its face or as applied, either expressly or by implication, requires, permits or results in any discriminatory State action.

5. The complaint fails to allege, either expressly, or by implication that the Act requires or permits invidious classification or discrimination of any kind based upon race.

6. The allegation of the complaint that the Act authorizes payments for the tuition of students in educational institutions which by purpose or effect segregate students by race fails to constitute an allegation of a denial of the equal protection of the laws.

WHEREFORE, defendants, Jose Diaz, et al. respectfully pray the Court to enter an Order dismissing plaintiffs' complaint for failure to state a claim upon which relief can be granted and to enter a judgment of dismissal in defendants' favor.

William B. Ball
Attorney for Jose Diaz, Enilda Diaz, Seth W. Watson, Jr., Anne P. Watson
Joseph G. Skelly
Attorney for William Zimmerspitz, Nancy Zimmerspitz, Arthur Harvey, Muriel Harvey
James E. Gallagher, Jr.
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MOTION OF JOSE DIAZ, ET AL. TO DISMISS THE SECOND AND THIRD COUNTS OF THE COMPLAINT FOR FAILURE OF PLAINTIFFS TO HAVE STANDING TO SUE THEREUNDER

(Title Omitted in Printing)

Defendants, Jose Diaz, Enilda Diaz, William Zimmerspitz, Nancy Zimmerspitz, F. Carl Kretzmann, Katheryn L. Kretzmann, Arthur Harvey, Muriel Harvey, Daniel F. X. Powell, Anna T. Powell, Seth W. Watson, Jr. and Anne P. Watson, respectfully move this Court to dismiss the Second and Third Counts of plaintiffs' complaint on the ground that plaintiffs do not have standing to sue thereunder. In support thereof, defendants assign the following reasons:

I.

Second Count

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1. The complaint fails to allege facts sufficient to show that any of the plaintiffs have religious beliefs, what such beliefs are, and to what extent, if any, Act 92 interferes with the free exercise of any religious belief of any plaintiff or with any religious practice which he may have.

II.

Third Count

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2. The issue of plaintiff's standing to sue under the Equal Protection Clause is res judicata by virtue

of the decision of this Court in Lemon v. Kurtzman, 310 F. Supp. 35, 41-43 (1969), in which the plaintiff herein, Alton J. Lemon, was a party plaintiff and in which the defendant herein, Grace Sloan, was a party defendant.

3. In the alternative: (a) the complaint fails to allege facts sufficient to show that any individual plaintiff suffers, or is threatened by, any discrimination; (b) the complaint fails to allege facts sufficient to show that plaintiff, Alton J. Lemon has an interest, either as a parent, or as a Negro parent, or as a parent of a child attending a public school in Pennsylvania, sufficient to entitle him to sue either on his own behalf or on behalf of all other persons similarly situated.

WHEREFORE, defendants, Jose Diaz, et al. respectfully pray the Court to enter an Order Dismissing the Second and Third counts of the plaintiffs' complaint.

William B. Ball
Attorney for Jose Diaz, Enilda Diaz, Seth W. Watson, Jr., Anne P. Watson

Joseph G. Skelly
Attorney for William Zimmerspitz, Nancy Zimmerspitz, Arthur Harvey, Murial Harvey

James E. Gallagher, Jr.
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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

Civil Action

No. 71-2223

Alton J. Lemon, Neal F. Bracken and
Benjamin S. Loewenstein

v.

Grace Sloan, State Treasurer of the
Commonwealth of Pennsylvania

Jose Diaz and Enilda Diaz, his wife, William Zimmerspitz and Nancy Zimmerspitz, his wife; F. Carl Kretzman and Katheryn L. Kretzmann, his wife; Arthur Harvey and Muriel Harvey, his wife; Daniel F. X. Powell and Anna T. Powell, his wife; and Seth W. Watson, Jr. and Anne P. Watson, his wife; and Henry E. Crouter,

Interveners

Before: William H. Hastie, Senior Circuit Judge, Joseph S. Lord, III, Chief District Judge, John B. Hannum, District Judge

OPINION

April 6, 1972

By Joseph S. Lord, III, Chief District Judge

Plaintiffs brought this suit to declare the Pennsylvania Parent Reimbursement Act for Nonpublic Education[1] (the "Act") unconstitutional and to enjoin its operation. The Act is challenged as violative of the Establishment and Free Exercise Clauses of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment. This court has jurisdiction of the controversy pursuant to 28 U.S.C. §§1331, 1343(3), 2281 and 2284. Presently before the court are motions of defendant and intervening defendants to dismiss the complaint for lack of standing and failure to state a claim upon which relief can be granted.

The plaintiffs are citizens, residents and taxpayers of the Commonwealth of Pennsylvania who have paid the Pennsylvania cigarette tax which finances the Act. Plaintiff Lemon is also the parent of a Negro child attending a public school in Pennsylvania. Defendant Sloan is State Treasurer of the Commonwealth of Pennsylvania and is sued in that capacity. Intervening defendants are citizens, residents and taxpayers of the Commonwealth of Pennsylvania. Interveners are parents of one or more students who are enrolled in nonpublic schools in Pennsylvania

[1] Act 92 of the Pennsylvania General Assembly, August 27, 1971. Appendix A, *infra*.

and interveners are eligible for tuition reimbursement payments under the Act.

The Act provides for the reimbursement of tuition payments to parents whose children have completed the school year in a nonpublic school located in Pennsylvania which fulfills the compulsory school attendance requirements under Pennsylvania law and the requirements of Title VI of the Civil Rights Act of 1964.[2] In its legislative findings and declaration of policy, the Pennsylvania General Assembly determined that parents who send their children to nonpublic schools assist the state in reducing the rising cost of public education. The General Assembly found that if inflation and rising costs of education force parents of children now enrolled in nonpublic schools to transfer a substantial number of their children to public schools, "an enormous added financial, educational and administrative burden would be placed upon the public schools and upon the taxpayers of the state."[3] Therefore, in order to insure that parents can continue to aid the state by sending their children to nonpublic schools and in order to foster educational opportunity for all children, the General Assembly established the tuition reimbursement program.

The first ground of defendants' motion to dismiss is that the complaint fails to state a claim under the Establishment Clause of the First Amendment upon

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[2] Title VI prohibits discrimination on the ground of race, color, or national origin in programs receiving federal financial assistance. 42 U.S.C. §2000d *et seq.*

[3] Section 2(4), Act 92, Appendix A.

which relief can be granted.[4] Plaintiffs allege that the Act authorizes payment for the tuition of students in educational institutions which:

> "* * * (1) are controlled by churches or religious organizations, (2) have as their purpose the teaching, propagation and promotion of a particular religious faith, (3) conduct their operations, cirriculums [sic] and programs to fulfill that purpose, (4) impose religious restrictions on admissions, (5) require attendance at instruction in theology and religious doctrine, (6) require attendance at or participation in religious worship, (7) are an integral part of the religious mission of the sponsoring church, (8) have as a substantial or dominant purpose the inculcation of religious values, (9) impose religious restrictions on faculty appointments, or (10) impose religious restrictions on what the faculty may teach." ¶10 Complaint.[5]

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[4] Defendants concede and we find that plaintiffs have standing to sue under the Establishment Clause. Flast v. Cohen, 392 U.S. 83 (1968).

[5] Defendant intervener Crouter has moved under F. R. Civ. P. 12(f) to strike paragraph 10 of plaintiff's complaint as immaterial and as requiring inquiry into the religious practices and character of schools to which parents choose to send their children in violation of the parents' right of free exercise of religion, privacy, and freedom of expression.

F. R. Civ. P. 12(f) provides that "the court may order stricken from any pleading, any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Defendant maintains that the allegations of paragraph 10 concerning the religious character of nonpublic schools are

For the purpose of considering the motion to dismiss, we must accept these allegations as true. Therefore, the issue before us is whether the Establishment Clause prohibits the state from reimbursing parents for the tuition costs of sending their children to church-related elementary and secondary schools.

The Establishment Clause was intended to protect against "sponsorship, financial support, and active involvement of the sovereign in religious activity." Walz v. Tax Commission, 397 U.S. 664, 668 (1970). *See also* Everson v. Board of Education, 330 U.S. 1 (1947), Engle v. Vitale, 370 U.S. 421 (1962).

> "Every analysis must begin with the candid acknowledgment that there is no single constitutional caliper which can be used to measure the precise degree to which these three factors

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constitutionally irrelevant because the Act does not give aid to schools, but to parents. However, the issue of whether the Act aids religious schools or aids parents to provide a religious education for their children is one of the issues in dispute in this litigation, and the allegations of paragraph 10 are certainly relevant to the plaintiffs' claims.

> "• • • The motion to strike should be granted only when the pleading to be stricken has no possible relation to the controversy." Brown and Williamson Tobacco Corp. v. U. S., 201 F. 2d 819, 822 (C.A. 6, 1953). See also August v. Bd. of Public Instruction, 306 F. 2d 862, 868 (C.A. 5, 1962), 2A J. Moore, Federal Practice ¶12.21[2] (2d ed. 1968).

Defendant's further objection concerning the constitutionality of inquiring into the religious character of the schools is premature and should be raised once such information is actually sought. We therefore deny defendant intervener's motion to strike paragraph 10.

are present or absent. Instead, our analysis in this area must begin with a consideration of the cumulative criteria developed over many years and applying to a wide range of governmental action challenged as violative of the Establishment Clause."

Tilton v. Richardson, 403 U.S. 672, 677-678; 29 L. Ed. 2d 790, 798 (1971).

In Lemon v. Kurtzman, 403 U.S. 602, 612-613; 29 L. Ed. 2d 745, 755 (1971), the Supreme Court restated the three tests it has developed for determining whether a particular program offends the Establishment Clause.

"* * * First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, Board of Education v. Allen, 392 U.S. 236, 243, 20 L. Ed. 2d 1060, 1065, 88 S. Ct. 1923 (1968); finally, the statute must not foster 'an excessive government entanglement with religion.' Walz, supra, at 674, 25 L. Ed. 2d at 704."

The stated legislative purpose of the Act is to aid parents to continue to send their children to nonpublic schools thereby fostering educational opportunities for both public and nonpublic school children. The legislative findings and declaration of policy indicate that the General Assembly is concerned with maintaining the present standards of public education which it finds would be seriously jeopardized if parents of nonpublic school children could no longer afford tuition costs and were forced

to send their children to public schools. "A State always has a legitimate concern for maintaining minimum standards in all schools it allows to operate." Lemon, supra, 403 U.S. at 613. Therefore, according the stated legislative intent appropriate deference, we conclude that the Act expresses a legitimate secular objective consistent with the Establishment Clause. See Allen, supra, 392 U.S. at 243. Lemon, supra, 403 U.S. at 613; Tilton, supra, 403 U.S. at 678-679.

We must next determine whether the Act has the primary effect of advancing religion. The very existence of this "test" reflects the Court's determination that there may be some forms of aid to church-related activities which do not involve that sponsorship, financial support or the active involvement of the state in religious activity which the Establishment Clause was intended to prevent. Although the Court "can only dimly perceive the boundaries of permissible government activity in this sensitive area of constitutional adjudication," Lemon, supra, 403 U.S. at 612, the Court has readily acknowledged that the test is not whether a religious institution derives some benefit from the government program. In upholding the constitutionality of federal aid for construction of buildings to be used for secular education at church-related colleges and universities, the Court stated:

> "* * * Construction grants surely aid these institutions in the sense that the construction of buildings will assist them to perform their various functions. But bus transportation, text-

> books and tax exemptions all gave aid in the sense that religious bodies would otherwise have been forced to find other sources from which to finance these services. Yet all of these forms of governmental assistance have been upheld. [Everson, supra, Allen, supra, Walz, supra] * * * The crucial question is not whether some benefit accrues to a religious institution as a consequence of the legislative program, but whether its principal or primary effect advances religion." Tilton, supra, 403 U.S. at 679. See also Walz, supra, 397 U.S. at 671-672.

In order to determine what factors distinguish permissible from prohibited aid, it is necessary to review briefly the Supreme Court decisions which have considered forms of aid to church-related schools under the primary effect test. In Everson, the Supreme Court upheld a state law which authorized the use of tax-raised funds to reimburse parents for the costs of transporting students to and from public and private schools. The Court held that the state could extend the benefits of public welfare legislation to all citizens despite the fact that such aid helped children to get to church-related schools and that there was the possibility that some children might not have been sent to church-related schools if their parents were required to pay transportation costs. The Court found that the purpose and effect of the law was to promote general public welfare by helping parents get their children safely to and from accredited schools. The Court concluded that the First Amendment does not require that the state cut off sectarian schools from general services

"so separate and so indisputably marked off from the religious function." Everson, supra, 330 U.S. at 18.

In Allen, the Supreme Court upheld a New York law which required local public school authorities to lend textbooks free of charge to all students in grades 7 through 12 including students attending private schools. The Court found no violation of the primary effect test for although the Court recognized that books can have an inherent religious significance which bus rides do not, the law provided that only secular books could be loaned and each book had to be approved by the public school authorities. The Court noted that the state has a legitimate interest in the manner in which private schools perform their secular education function. On the basis of the "meager record" in the case, the Court could not conclude that:

> "* * * either all teaching in a sectarian school is religious or that the processes of secular and religious training are so intertwined that secular textbooks furnished to students by the public are in fact instrumental in the teaching of religion." 392 U.S. at 248.

Therefore, the Court upheld the law as providing a general service to all students which was consistent with the state's interest in promoting secular education in all schools.

In Lemon, the Court held that a Pennsylvania law which reimbursed private schools for the cost of teachers' salaries, textbooks and instructional materials in certain specified secular subjects and a Rhode

Island law which supplemented the salaries of teachers of secular subjects in private elementary schools violated the Establishment Clause because the programs involved excessive government entanglement with religion. Although the Court found it unnecessary to apply the primary effect test, the Court's analysis of the statutes in terms of this test is instructive. The Court reaffirmed its agreement in principle with the holding in Allen that "secular and religious education are identifiable and separable." However, the Court noted that both the Pennsylvania and Rhode Island legislatures recognized that "church-related elementary and secondary schools have a significant religious mission and that a substantial portion of their activities are religiously oriented." Therefore, in order to guarantee that state financial aid supports only secular education in these schools, the two legislatures imposed statutory restrictions on their aid programs. Although the Court did not reach the question of whether these restrictions effectively prevented the aid programs from having a primary effect which violated the Establishment Clause, it is clear from the opinion that the Court agreed that given the nature of the proposed aid and the character of the school, the state was required to impose restrictions to insure that the aid benefited only secular education in order to comply with the Establishment Clause.

> "* * * The Rhode Island Legislature has not, *and could not,* provide state aid on the basis of a mere assumption that secular teachers under religious discipline can avoid conflicts. *The State must be certain, given the Religion Clauses,*

> *that subsidized teachers do not inculcate religion*—indeed the State here has undertaken to do so." Lemon, supra, 403 U.S. at 619 (emphasis added).

Finally, in Tilton, the Court upheld the constitutionality of federal aid to church-related colleges and universities for construction of buildings and facilities used exclusively for secular educational purposes. In evaluating the statute in terms of its effect, the Court first reviewed the provisions of the law and found that it was carefully drafted to insure that federally subsidized buildings would be devoted to secular and not religious functions. However, the Court concluded that a provision of the law which permitted unrestricted use of the buildings after 20 years violated the Establishment Clause primary effect test. This decision represents the first instance in which the Court has invalidated legislation under that test.

> "* * * It cannot be assumed that a substantial structure has no value after that period and hence the unrestricted use of a valuable property is in effect a contribution of some value to a religious body. * * * If, at the end of 20 years the building is, for example, converted into a chapel or otherwise used to promote religious interests, the original federal grant will in part have the effect of advancing religion." Tilton, supra, 403 U.S. at 683.

The Court next examined the administration of the law and found that the restrictions on use had been complied with by the recipient institutions.

Finally, on the basis of the record before it, the Court refused to conclude that religion so permeated the secular education provided by church-related colleges and universities that their religious and secular education functions were inseparable and that therefore government support of any activity of these institutions necessarily involved impermissible support of religion.[6]

These cases establish the following points of reference for any application of the primary effect test. First, absent any evidence to the contrary, the Supreme Court accepts the principle that secular and religious education in church-related schools are identifiable and separable. Second, the state has a legitimate interest in promoting the general welfare and the secular education of all school children. Third, the state may enact programs to promote the general welfare which include sectarian school students among the recipients provided the aid given has no inherent religious significance (e.g., bus rides, public health services), even though the aid may facilitate the operation of sectarian schools. Fourth, the state may enact programs to promote secular education in accredited schools, including church-related schools, provided the state can be certain from the nature of the aid granted or the restrictions placed upon its use that the programs will assist only secular education in church-related schools and provided further that the restrictions required to insure secular use do not give rise to excessive government entangle-

[6] The Court also found that the legislation did not foster excessive government entanglement with religion.

ment with religion in the administration of the aid program. Finally, in order for a court to conclude that a statute has the constitutionally impermissible effect of advancing religion, the court is not required to conclude that the scheme of assistance will necessarily aid religion; the court can conclude that the statute has the effect of advancing religion if the terms of the statute fail to preclude a possible use of government funds to promote religious exercises.

The Act under review reimburses parents who have expended money for tuition at nonpublic schools. The legislative findings and declaration of policy underscore the legislative judgment that this type of aid will have the effect of enabling nonpublic schools, which include church-related schools, to continue to operate in Pennsylvania. The cases are clear that the state cannot directly support religious education in church-related schools although in some circumstances the state may provide sectarian schools with "secular, neutral or nonideological services, facilities, or materials." Lemon, supra, 403 U.S. at 616. The present Act contains no provisions to insure that state funds are restricted to such purposes. Clearly an unrestricted grant of funds by the state directly to church-related schools would constitute state support of religious instruction and worship in violation of the Establishment Clause.

> "* * * General subsidies of religious activities would, of course, constitute impermissible state involvement with religion." Walz, supra, 397 U.S. at 690 (Brennan, J. concurring).

Recognizing this, defendants maintain that the Act is constitutional because the Act aids the parents and not the schools. The state enters into no direct relationship with nonpublic schools because funds are paid directly to parents who have paid tuition to nonpublic schools. Once the parents receive the funds, the state has no control over their use.[7] Fur-

[7] Defendants cite Hysong v. Gallitzin Borough School District, 164 Pa. 629 (1894), for the proposition that payment of state funds is not unconstitutional because the recipients may use these funds for religious purposes. Hysong involved the question of whether a public school could employ Catholic nuns to teach secular subjects. One argument raised by plaintiffs was the fact that the nuns had taken a vow of poverty and turned over their salaries to their church and therefore state salary payments were being used to support religion. The Pennsylvania Supreme Court rejected this argument on the grounds that "American men and women, of sound mind and twenty-one years of age, can make such disposition of their surplus *earnings* as suits their own notions." Hysong, supra, 164 Pa. at 656 (emphasis added).

Hysong is clearly distinguishable from the case before us because there is no question that individuals are free to dispose of money earned by them in the course of their employment for whatever purposes they choose, including support of religion. In fact the principle of government neutrality in religious affairs is premised on the belief that religions should be supported solely by the voluntary contributions of their members. In determining whether state payments under the Act are constitutional, we must examine the criteria which qualify an individual for receipt of the funds. Certainly there can be no objection to state payments to state employees for secular teaching services in the public schools. The issue before this court is whether individuals may receive state funds solely because they have paid tuition at a church-related school.

thermore, defendants argue that in Everson and Allen the Supreme Court distinguished between aid to parents and students and aid to institutions and held that state aid to parents and students does not have the primary effect of advancing religion even though sectarian schools benefit from transportation services and nonreligious textbook loans.

First, we disagree with defendants' reading of Everson and Allen. The critical factor in both cases was that the subsidized school activities were non-ideological or secular and therefore the public grants did not directly support religious education in the sectarian schools, although the aid did support the operation of the schools. But the fact that aid is given to parents in itself does not prevent the subsidy from having a primary effect of supporting religious instruction and worship in church-related schools. In Allen, the fact that the Court considered the parents and students as the beneficiaries of the aid would not have prevented the Court from striking down the law if it provided for loans of religious books to the schools. The school aid cases emphasize that the court must examine the character of the aided activity rather than the manner in which aid is given in order to determine whether the state subsidy has the primary effect of advancing religion.

Second, we conclude that the effect of the Act is to aid the schools and therefore the failure of the state to insure that the funds are restricted to secular education or general welfare services renders the Act

unconstitutional.[8] Parents are eligible to receive payments under the Act because they have paid tuition at a nonpublic school. Tuitions are the "very life blood" of private educational institutions, Almond v. Day, 197 Va. 419, 427, 89 S.E. 2d 851, 857 (1955), because they are the source from which many educational services, secular as well as religious, are funded. If parents cannot afford to pay the tuition, they must take their child out of the nonpublic schools and if enough parents are unable to pay these costs, the schools will be forced to close. It was precisely this possibility that led the Pennsylvania General Assembly to pass the Act under review. By providing parents with additional funds because they have paid tuition at nonpublic schools, the Commonwealth is trying to insure the continued ability of the parents to afford tuition costs and therefore the continued existence of nonpublic schools, including sectarian schools. The necessary effect of such a program, if it is to succeed, is that the schools will be aided by state funds. The state cannot maintain that the Act has the purpose of promoting education by supporting nonpublic schools and then deny that the effect of the Act is to aid these schools.

Defendants argue that we cannot ascertain that parents will be encouraged to send their child to church-related schools because of the state aid pro-

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[8] If the Act did include restrictions on the use of the funds, the Act would also have to avoid excessive government entanglement with religion in its administration of these restrictions. See Lemon and Tilton. The combination of the primary effect and entanglement tests clearly restricts the scope of permissible government aid to religious schools.

gram. Parents may send their child to a sectarian school one year and despite the reimbursement payment decide to enroll their child in another type of school the next year. Therefore defendants argue that we cannot conclude that the Act has the necessary effect of advancing religion. However, Tilton established that a government aid program can be invalidated on the basis of a significant risk that the aid may serve to support religious activity at some future time. In Tilton, there was no evidence that the colleges receiving construction grants planned to convert the buildings into chapels or otherwise use them for religious activities after twenty years had passed. Nevertheless, the Court found the possibility of such use enough to strike down the provision of the statute which permitted unrestricted use of the buildings after twenty years. It is clear that a possible and quite likely use of the aid under review is to enable parents to continue to pay tuition at sectarian schools. Tuition payments support both religious and secular education at these schools. The mere fact that the Act does not require that parents use the funds to pay tuition at church-related schools does not relieve the state of its duty to preclude the use of its funds to support religious activities.

State courts have held that tuition grant programs in which the state channeled funds through the parents or students to the schools violate the First Amendment and state constitutional provisions.[9]

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[9] "The parent or guardian to whom the tuition fees are paid is merely the conduit or channel through whom the aid from the State to the school is transmitted." Almond v. Day, supra, 89 S.E. 2d at 857.

Almond v. Day, supra, Hartness v. Patterson, 179 S.E. 2d 907 (S. Carolina 1971), Opinion of the Justices, 259 N.E. 2d 564 (Mass. 1970). Defendants argue that unlike the "conduit" plans, the Pennsylvania Act does not make payments to parents in a form that can only be used at an educational institution. Therefore, it cannot be established that the dollar used to pay tuition is the dollar the parents received from the state. However, we do not perceive any constitutional significance in the fact that payments are made in the form of reimbursement to the parents, a conduit plan or directly to the school. The economic consequences are the same for the church-related school whether it receives funds through a direct grant, a conduit plan or because the state increases family incomes through a reimbursement program which enables the parents to continue to pay tuition. In each case, tax-raised funds are being used to subsidize religious education.

Finally, even if we held that the Act does not aid sectarian schools, we must still conclude that the Act supports religion because it aids parents in providing a religious education for their children. It would seem indisputable that at least one, if not

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"We reject the argument that the tuition grants provided under the Act do not constitute aid to the participating schools. Students must pay tuition fees to attend institutions of higher learning and the institutions depend upon the payment of such fees to aid in financing their operations. While it is true that the tuition grant aids the student, it is also of material aid to the institution to which it is paid." Hartness v. Patterson, supra, 179 S.E. 2d at 909.

the main, purpose of a parent's sending his child to a religious school is to insure the early inculcation of religion. See Walz, supra, 397 U.S. at 671. Assuming equal secular educational standards as between public and religious schools, it is an almost inescapable sequitur that the statutory reimbursement is solely to enable the parents to augment the public school secular education with religious training. If parents cannot afford to provide religious education for their children in sectarian schools without state aid, then by providing a program for aiding the parents, the state is plainly advancing religious education. The state has no more power to subsidize parents in providing a religious education for their child than it has to subsidize church-related schools to do so. See Brusca v. State of Missouri ex rel. State Bd. of Ed., 332 F. Supp. 275 (E.D. Mo. 1971).

Having concluded that the Establishment Clause precludes state reimbursement of sums that parents have paid as tuition to schools that provide religious education, we need not consider defendants' arguments that the complaint should be dismissed for lack of standing and failure to state a claim under the Free Exercise and Equal Protection Clauses. We therefore deny defendants' motion to dismiss the complaint.

ORDER

AND NOW, this 6th day of April, 1972, it is ORDERED that the defendants' motion to dismiss the complaint be and it hereby is DENIED.

By the Court:

William H. Hastie
Senior Circuit Judge

Joseph S. Lord, III
Chief District Judge

John B. Hannum
District Judge

APPENDIX A

No. 92

AN ACT

HB 1379

Creating an authority for the purpose of avoiding increased costs of public education by providing partial reimbursement for nonpublic education and defining its powers and duties.

The General Assembly of the Commonwealth of Pennsylvania hereby enacts as follows:

Section 1. Short Title.—This act shall be known and may be cited as the "Parent Reimbursement Act for Nonpublic Education."

Section 2. Legislative Finding; Declaration of Policy.—It is hereby determined and declared as a matter of legislative finding:

(1) That parents who send their children to nonpublic schools assist the State in reducing the rising costs of public education.

(2) The welfare of the Commonwealth requires that this and future generations of school age children be assured ample opportunity to develop to the fullest their intellectual capacities. To further this objective the Commonwealth has had in force for many years a compulsory school attendance law.

(3) In the exercise of their constitutional right to choose nonpublic education for their children, parents who support such education make a major contribution to the public welfare. However, the immense impact of inflation, plus sharply rising costs of education, now combine to place in jeopardy the ability of such parents fully to carry this burden.

(4) Should parents of children now enrolled in nonpublic schools be forced by economic circumstances to transfer any substantial number of their children to public schools, an enormous added financial, educational and administrative burden would be placed upon the public schools and upon the taxpayers of the State. Without allowance for inflationary increase, the annual operating cost of

educating in public schools, the five hundred thousand students now enrolled in Pennsylvania's nonpublic schools would be an additional four hundred million dollars ($400,000,000). Necessarily added capital costs to construct new facilities or acquire existing facilities would be in excess of one billion dollars ($1,000,000,000). Any substantial portion of these operating and capital costs would be an intolerable public burden and present standards of public education would be seriously jeopardized. Therefore, parents who maintain students in nonpublic schools provide a vital service to the Commonwealth.

Wherefore, it is declared to be the public policy of the Commonwealth:

That, in order to reimburse parents partially for this service so vitally needed by the Commonwealth, and in order to foster educational opportunity for all children, a program of Parent Reimbursement for Nonpublic Education is hereby established.

Section 3. Definitions.—The following terms, whenever used or referred to in this act, shall have the following meanings, except in those instances where the context clearly indicates otherwise:

(1) "Parent" means a resident of the Commonwealth of Pennsylvania who is a parent of a child enrolled in a nonpublic school or a person standing in loco parentis to such child.

(2) "Nonpublic school" means any school, other than a public school, within the Commonwealth of

Pennsylvania, wherein a resident of the Commonwealth may legally fulfill the compulsory school attendance requirements of law and which meets the requirements of Title VI of the Civil Rights Act of 1964 (Public Law 88-352).

(3) "Student" means a resident of the Commonwealth of Pennsylvania who is enrolled in a nonpublic school.

(4) "Parent Reimbursement Fund" means the fund created by this act.

Section 4. Pennsylvania Assistance Authority.—There is hereby created a body corporate and politic to be known as the Pennsylvania Parent Assistance Authority, which shall consist of five members appointed by the Governor and which shall have responsibility for the administration of the program created by this act. All members shall be of full age, citizens of the United States, and residents of the Commonwealth and shall be appointed for terms of five years each. The members of the authority shall select from among themselves a chairman and a vice-chairman. The authority may employ a secretary and such other employes as it may require. Three members of the authority shall constitute a quorum for its meetings. Members shall receive no compensation for their services but shall be reimbursed for their expenses actually and necessarily incurred by them in the performance of their duties under this act. The authority shall have power to make and promulgate rules and regulations for the administration of this act: Provided, however,

That it shall exercise no direction, supervision or control over the policy determinations, personnel, curriculum, program of instruction or any other aspect of the administration or operation of any nonpublic school or schools.

The authority shall have no power, at any time or in any manner to pledge the credit or taxing power of the Commonwealth, nor shall any of its obligations or debts be deemed to be obligations of the Commonwealth, and all contracts between the authority and parents or other persons in loco parentis shall be satisfied solely from funds provided under this act.

Section 5. Parent Reimbursement Fund.—There is hereby created for the special purpose of this act, a Parent Reimbursement Fund. Beginning July 1, 1971, twenty-three per cent of the tax revenue collected by the Department of Revenue, pursuant to the act of July 22, 1970 (P. L. 513), known as the "Pennsylvania Cigarette Tax Act," shall be paid into the State Treasury to the credit of the Parent Reimbursement Fund.

Moneys in the Parent Reimbursement Fund are hereby appropriated to the Pennsylvania Parent Assistance Authority, to be used solely for the purposes of this act.

All expenses incurred in connection with the administration of this act shall be paid solely out of the Parent Reimbursement Fund.

Section 6. Eligibility.—In order to be eligible for tuition reimbursement hereunder, the parent of a

student shall, at the completion of the school year but not later than July fifteenth, file with the Parent Assistance Authority a verified statement that the student has completed the school year in a nonpublic school or schools and, in addition, the following information: (i) the name and address of the parent; (ii) the name, address and birth date of the student; (iii) the name and address of the nonpublic school or schools in which the student completed the school year and (iv) a receipted tuition bill or copy of the executed contract under which the student attended the nonpublic school or schools.

Section 7. Tuition Reimbursement Payments to Parents.—Upon the filing by a parent of the verified statement as required by section 6, the Parent Assistance Authority shall make a tuition reimbursement payment to such parent in the amount of (i) seventy-five dollars ($75) for each elementary school student to whom the parent bears a parental relationship and one hundred fifty dollars ($150) for each secondary student to whom the parent bears a parental relationship, or (ii) the actual amount of tuition paid or contracted to be paid by a parent, whichever is lesser.

Reimbursement payments to parents hereunder shall be made not later than September fifteenth in the school year following the school year for which tuition reimbursement payments are being made.

Section 8. Penalties.—The Parent Assistance Authority shall have power to employ means reasonably necessary to determine the accuracy of all statements

submitted by parents in connection with reimbursement payments hereunder. Any person who, by means of a wilfully false statement, secures or attempts to secure or aids or abets any person in securing reimbursement payment hereunder, shall be guilty of a misdemeanor, and, upon conviction thereof, shall be sentenced to pay a fine of not exceeding one thousand dollars ($1,000), or to undergo imprisonment not exceeding one year, or both, and shall also be sentenced to make restitution of any moneys he has received by reason of any false statement.

Section 9. Insufficient Moneys in Fund.—In the event that, in any fiscal year, the total amount of moneys which were actually paid into the Parent Reimbursement Fund shall be insufficient to pay the total number of claims submitted by parents to the Parent Assistance Authority, the reimbursement payments provided for in section 7 shall be proportionate in amount to the per cent which the total amount of moneys in the Parent Reimbursement Fund bears to the total amount of claims.

Section 10. Severability.—If a part of this act is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of this act is invalid, in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications.

Section 11. Effective Date.—This act shall take effect immediately.

APPROVED—The 27th day of August, A.D. 1971.
Milton J. Shapp

The foregoing is a true and correct copy of Act of the General Assembly No. 92.

C. DeLores Tucker
Secretary of the Commonwealth

ORDER

(Title Omitted in Printing)

AND NOW, this 28th day of April, 1972, upon consideration of the motions of the defendant and intervening defendants to dismiss Counts 2 and 3 of the plaintiffs' complaint, it is ORDERED that they be and hereby are GRANTED on the authority of Lemon v. Kurtzman, 310 F. Supp. 35 (E.D. Pa. 1969).

By the Court,

William H. Hastie
Senior Circuit Judge

Joseph S. Lord, III
Chief District Judge

John B. Hannum
District Judge

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ANSWER

(Title Omitted in Printing)

First Defense

Defendant Grace Sloan, by her attorneys, answers to the complaint herein as follows:

1. Denied. Defendant lacks knowledge and information sufficient to form a belief as to the truth of the allegations in Paragraph 1 of the complaint.

2. Denied. Defendant lacks knowledge and information sufficient to form a belief as to the truth as to the allegations in Paragraph 2 of the complaint.

3. Admitted.

4. Admitted.

5. Denied. Defendant lacks knowledge and information sufficient to form a belief as to the truth of the allegations in Paragraph 5 of the complaint.

6. Denied. Defendant lacks knowledge and information sufficient to form a belief as to the truth of the allegations in Paragraph 6 of the complaint.

7. Admitted.

8. Admitted. Defendant admits that on August 27, 1971 the Governor of the Commonwealth of Pennsylvania signed into law Act No. 92 of the Laws of Pennsylvania, 1971, known as the "Parent Reimbursement Act for Nonpublic Education." Defend-

ant further admits that Appendix A is a true and correct copy of said Act. Defendant denies that plaintiffs have correctly summarized the text of the Act. The Act, which is legislation of the Commonwealth of Pennsylvania and in writing, speaks for itself.

9. Denied. Defendant is advised by counsel that the allegation of Paragraph 9 of the complaint is a conclusion of law which requires no response.

10. Denied. Defendant denies that plaintiffs have correctly summarized and characterized the Act. The Act, which is legislation of the Commonwealth of Pennsylvania and in writing, speaks for itself.

11. Denied. Defendant denies that plaintiffs have correctly summarized and characterized the Act. The Act, which is legislation of the Commonwealth of Pennsylvania and in writing, speaks for itself.

12. Denied. Defendant denies that plaintiffs have correctly summarized and characterized the Act. The Act, which is legislation of the Commonwealth of Pennsylvania and in writing, speaks for itself.

13. Denied. Defendant is advised by counsel that the allegations of Paragraph 13 of the complaint are conclusions of law which require no response.

14. Denied. Defendant is advised by counsel that the allegations of Paragraph 14 of the complaint are conclusions of law which require no response.

15. Denied. Defendant is advised by counsel that the allegations of Paragraph 15 of the complaint are conclusions of law which require no response.

16. Defendant admits that there is a genuine case or controversy between the parties with respect to those allegations of the complaint, if any, which aver that Act No. 92 violates the Establishment Clause of the First Amendment of the Constitution of the United States.

17. Denied. Defendant is advised by counsel that the allegations of Paragraph 17 of the complaint are conclusions of law which require no response.

Second Defense

The complaint fails to state a claim against defendant upon which relief can be granted.

WHEREFORE, defendant demands judgment dismissing the complaint, together with its costs and disbursements in this action and such other relief as may be just and proper.

J. Shane Creamer
Attorney General

J. Justin Blewitt, Jr.
Deputy Attorney General
Attorneys for Defendant

ANSWER OF INTERVENER DEFENDANTS JOSE DIAZ, ET AL.

(Title Omitted in Printing)

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1. Denied. Intervener Defendants lack knowledge and information sufficient to form a belief as to the truth of the allegations in paragraph 1 of the complaint.

2. Denied. Intervener Defendants lack knowledge and information sufficient to form a belief as to the truth of the allegations in paragraph 2 of the complaint.

3. Admitted.

4. Admitted.

5. Denied. Intervener Defendants lack knowledge and information sufficient to form a belief as to the truth of the allegations in paragraph 5 of the complaint.

6. Denied. Intervener Defendants lack knowledge and information sufficient to form a belief as to the truth of the allegations in paragraph 6 of the complaint.

7. Admitted.

8. Intervener Defendants admit that on August 27, 1971 the Governor of the Commonwealth of Pennsylvania signed into law Act 92 of the Laws of Pennsylvania, 1971, known as the "Parent Reim-

bursement Act for Nonpublic Education". Intervener Defendants further admit that "Appendix A" is a true and correct copy of said Act. Intervener Defendants deny that plaintiffs have correctly summarized the text of the Act. The Act, which is legislation of the Commonwealth of Pennsylvania and in writing, speaks for itself.

9. Intervener Defendants are advised by counsel that the allegation of paragraph 9 of the complaint is a conclusion of law which requires no response.

10. Denied. Intervener Defendants deny that plaintiffs have correctly summarized and characterized the Act. The Act, which is legislation of the Commonwealth of Pennsylvania and in writing, speaks for itself.

11. Denied. Intervener Defendants deny that plaintiffs have correctly summarized and characterized the Act. The Act, which is legislation of the Commonwealth of Pennsylvania and in writing, speaks for itself.

12. Denied. Intervener Defendants deny that plaintiffs have correctly summarized and characterized the Act. The Act, which is legislation of the Commonwealth of Pennsylvania and in writing, speaks for itself.

13. Intervener Defendants are advised by counsel that the allegations of paragraph 13 of the complaint are conclusions of law which require no response.

14. Intervener Defendants are advised by counsel that the allegations of paragraph 14 of the complaint are conclusions of law which require no response.

15. Intervener Defendants are advised by counsel that the allegations of paragraph 15 of the complaint are conclusions of law which require no response.

16. Intervener Defendants admit that there is a genuine case or controversy between the parties with respect to those allegations of the complaint, if any, which aver that Act 92 violates the Establishment Clause of the First Amendment of the Constitution of the United States. Intervener Defendants deny that there is a genuine case or controversy with respect to any other claims alleged by plaintiffs.

17. Intervener Defendants are advised by counsel that the allegations of paragraph 17 of the complaint are conclusions of law which require no response.

First Defense

18. The complaint fails to state a claim upon which relief can be granted.

Second Defense

19. Intervener Defendants, Seth W. Watson, Jr. and Anne P. Watson, his wife, are parents of Ellen P. Watson, who is enrolled in a nonpublic school, as defined in the Act, which is nonchurch-related.

20. Intervener Defendants, Jose Diaz, Enilda Diaz, William Zimmerspitz, Nancy Zimmerspitz, Arthur Harvey, Muriel Harvey, Daniel F. X. Powell, Anna T. Powell, F. Carl Kretzmann and Katheryn L. Kretzmann, are parents of children who are enrolled

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in nonpublic schools, as defined in the Act, which are church-related.

21. With respect to the Intervener Defendants named in paragraph 19 above, the complaint fails to state a claim under the Establishment Clause upon which relief can be granted.

22. With respect to the Intervener Defendants named in paragraph 20 above, the complaint fails to state a claim under the Establishment Clause upon which relief can be granted.

Third Defense

23. Intervener Defendants incorporate by reference the allegations of paragraphs 19 and 20.

24. The Act provides public welfare benefits to all of these parents in the form of the payments thereunder.

25. To deny to these parents the benefits of the Act, solely because their said children attend nonpublic schools, would constitute a denial to them of the Equal Protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States.

Fourth Defense

26. Intervener Defendants incorporate by reference the allegations of paragraphs 19 and 20.

27. The Act provides public welfare benefits to all of these parents in the form of the payments thereunder.

28. To deny to the parents named in paragraph 20 above, the benefits of the Act, solely because they exercise their constitutional right to send their children to church-related schools under the Compulsory Attendance Laws of the Commonwealth of Pennsylvania, would constitute a denial to them of the equal protection of the laws in violation of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

WHEREFORE, Intervener Defendants pray the Court to dismiss the Complaint and enter judgment in favor of all defendants, with costs.

William Bentley Ball
Attorney for Jose Diaz, Enilda Diaz, Seth W. Watson, Jr. and Anne P. Watson

Joseph G. Skelly
Attorney for William Zimmerspitz, Nancy Zimmerspitz, Arthur Harvey and Muriel Harvey

James E. Gallagher, Jr.
Attorney for Daniel F. X. Powell and Anna T. Powell

C. Clark Hodgson, Jr.
Attorney for F. Carl Kretzmann and Katheryn L. Kretzmann

Of Counsel:
Ball & Skelly
127 State Street
Harrisburg, Penna. 17101

Stradley, Ronon, Stevens
& Young
1300 Two Girard Plaza
Philadelphia, Penna. 19102

William D. Valente
Villanova, Penna. 19085

ANSWER OF INTERVENOR DEFENDANT CROUTER

(Title Omitted in Printing)

First Defense

Intervenor Defendant Crouter admits that this action purports to be a civil action brought by plaintiffs on their own behalf and on behalf of others similarly situated for a temporary and permanent injunction as alleged by plaintiffs in paragraph 1. Intervenor Defendant Crouter admits that on August 27, 1971, the Governor of the Commonwealth of Pennsylvania signed into law Act 92 of the Laws of Pennsylvania, 1971, known as the "Parent Reimbursement Act for Nonpublic Education" (hereinafter referred to as the "Act") as alleged in paragraph 8. Intervenor Defendant Crouter admits the allegations contained in paragraphs 2, 3, 7 and 16, only in so far as they allege a cause of action under the Establishment Clause of the First Amendment of the United States Constitution.

Intervenor Defendant Crouter denies the allegations of paragraph 10 on the grounds that the Act speaks for itself and is absolutely silent as to the religious or nonreligious practices of schools attended by students whose parents are eligible to apply for benefits under the Act. Furthermore, said allegations are irrelevant and any attempted inquiry into the religious practices of schools or of parents vio-

lates the Free Exercise provisions of the First Amendment and the rights of privacy and freedom of expression guaranteed under the First, Ninth, and Fourteenth Amendments.

Intervenor Defendant Crouter denies the balance of the allegations in paragraph 1, including the allegation that the plaintiffs properly sue on behalf of all others similarly situated and denies each and every allegation contained in paragraphs 11, 12, 13, 14, 15 and 17.

Intervenor Defendant Crouter is without knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in paragraphs 4, 5, 6 and 9 and every remaining allegation in plaintiffs' complaint.

Second Defense

Plaintiffs' complaint alleges no facts which demonstrate that plaintiffs have standing to sue, other than to assert claims under the Establishment Clause of the First Amendment.

Third Defense

Plaintiffs' complaint fails to state a claim upon which relief can be granted.

Fourth Defense

Inquiry into the religious practices of nonpublic schools or of parents applying for benefits under the

Act violates the Free Exercise provisions of the First Amendment and the rights of privacy and freedom of expression guaranteed under the First, Ninth and Fourteenth Amendments.

Fifth Defense

Plaintiffs' complaint alleges no basis for them to sue on behalf of others similarly situated.

WHEREFORE, Intervenor Defendant Crouter demands that the plaintiffs' complaint be dismissed and that judgment be entered in favor of all defendants and Intervenor Defendants.

Duane, Morris & Heckscher

By Henry T. Reath

Attorneys for Intervenor Defendant, Crouter

MOTION OF INTERVENER DEFENDANTS SETH W. WATSON, JR. AND ANNE P. WATSON FOR SUMMARY JUDGMENT

(Title Omitted in Printing)

Intervener defendants Seth W. Watson, Jr. and Anne P. Watson by their attorney William B. Ball, move the Court, pursuant to Rule 56 of the Federal Rules of Civil Procedure, to enter summary judgment in their favor dismissing plaintiffs' complaint for the reason that the pleadings and affidavits of record show that there is no genuine issue as to any material fact and that the movants are entitled to a judgment as a matter of law.

William B. Ball
Attorney for Intervener Defendants Seth W. Watson, Jr. and Anne P. Watson

AFFIDAVIT OF INTERVENER DEFENDANTS SETH W. WATSON, JR. AND ANNE P. WATSON

(Title Omitted in Printing)

Commonwealth of Pennsylvania,
County of Philadelphia, ss:

SETH W. WATSON, JR. and ANNE P. WATSON, being duly sworn according to law, depose and say:

1. That they are two of the Defendants in this action who were granted intervention pursuant to Rule 24(a) of the Federal Rules of Civil Procedure by Order of this Court dated January 19, 1972;

2. That they are taxpayers and citizens of the United States of America and the Commonwealth of Pennsylvania who reside with their three children in Montgomery County which is within the Eastern District of Pennsylvania;

3. That they are "parents" of a "student" who is enrolled in a "nonpublic school" as those terms are defined in Act 92 of the Laws of Pennsylvania, 1971, which Act is known as the "Parent Reimbursement Act for Nonpublic Education";

4. That one of their children, Ellen P. Watson, age 12, is enrolled as a sixth-grade student at the Baldwin School, a nonpublic school in Montgomery County, Pennsylvania, wherein the requirements of the Pennsylvania Compulsory School Attendance Law

may be fulfilled and which meets the requirements of Title VI of the Civil Rights Act of 1964;

5. That the said school is not a school which is church related, controlled by a religious organization or organizations, or has the purpose of propagating and promoting a particular religious faith and conducts its operations to fulfill that purpose;

6. That the deponents have paid tuition to the Baldwin School for and on behalf of Ellen P. Watson for the academic year 1971-1972;

7. That they intend to seek and will be eligible for a tuition reimbursement payment under the Act based upon the tuition paid on behalf of Ellen P. Watson, and

8. That they will fulfill and observe all of the requirements of the Act necessary to obtain reimbursement.

Seth W. Watson, Jr.
Anne P. Watson

Sworn to and subscribed before me this 3rd day of May A.D. 1972.

Thomas J. Cauley
Notary Public
Philadelphia, Phila. Co., Pa.

My Commission Expires February 1, 1973.

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

(Title Omitted in Printing)

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1. On September 13, 1971, plaintiffs' Complaint was filed seeking to have the Parent Reimbursement Act for Nonpublic Education (Act 93 of the Laws of Pennsylvania, August 27, 1971) declared unconstitutional and payments thereunder enjoined.

2. On November 12, 1971, defendant Grace Sloan filed a Motion To Dismiss the Complaint. Subsequently, intervener defendants filed similar Motions To Dismiss.

3. On April 6, 1972, after oral argument, this Court denied defendants' and intervener defendants' Motions To Dismiss, holding that the First Count of Plaintiffs' Complaint made out a cause of action under the Establishment Clause of the United States Constitution, and that "the failure of the state to insure that the funds are restricted to secular education or general welfare services, renders the Act unconstitutional."

4. On May 2, 1972, defendant and intervener defendants filed Answers to plaintiffs' Complaint. Those Answers, insofar as they relate to the First Count of Plaintiffs' Complaint, did not raise any issues of fact other than those regarding which Affidavits are herewith filed. Consequently, there is

no genuine issue as to any material fact and plaintiffs are entitled to judgment as a matter of law pursuant to Rule 56 F.R. Civ. P.

5. In support of this Motion, plaintiffs rely upon the Opinion of this Court entered on April 6, 1972, the pleadings and the Affidavits of plaintiffs attached hereto.

WHEREFORE, plaintiffs request that this Court enter judgment in favor of plaintiffs, declare the Parent Reimbursement Act for Nonpublic Education unconstitutional on its face, and permanently enjoin defendant Grace Sloan from paying out any funds to reimburse any parents pursuant to said Act.

Mann and Ungar
By: Theodore R. Mann
Leo Pfeffer
Attorneys for Plaintiffs

Commonwealth of Pennsylvania,
County of Philadelphia, ss:

AFFIDAVIT

ROBERT BAER COHEN, ESQUIRE, being duly sworn according to law, deposes and says that he is an attorney practicing in the Commonwealth of Pennsylvania; that he knows of his own personal knowledge that Benjamin S. Loewenstein is a citizen, resident and taxpayer in the United States and in the

Commonwealth of Pennsylvania; and that Benjamin S. Loewenstein has purchased and continues to purchase cigarettes in the Commonwealth of Pennsylvania and has paid the tax due pursuant to the Act of July 22, 1970 (P. L. 513) known as the "Pennsylvania Cigarette Tax Act."

Robert Baer Cohen

Sworn to and subscribed before me this 3rd day of May, 1972.

Linda J. Wondoloski
Notary Public
Philadelphia, Phila. Co., Pa.

My Commission Expires August 18, 1975.

Commonwealth of Pennsylvania,
County of Philadelphia, ss:

AFFIDAVIT

ALTON J. LEMON, being duly sworn according to law, deposes and says that he is a citizen, resident and taxpayer in the United States and in the Commonwealth of Pennsylvania; that he has purchased and continues to purchase cigarettes in the Commonwealth of Pennsylvania and has paid the tax due pursuant to the Act of July 22, 1970 (P. L. 513) known as the "Pennsylvania Cigarette Tax Act."

Alton J. Lemon

Sworn to and subscribed before me this 3rd day of May, 1972.

Linda J. Wondoloski
Notary Public
Philadelphia, Phila. Co., Pa.

My Commission Expires August 18, 1975.

AFFIDAVIT

(Title Omitted in Printing)

NEAL F. BRACKEN, being duly sworn according to law, deposes and says that he is a citizen, resident and taxpayer in the United States and in the Commonwealth of Pennsylvania; that he purchased at all times relevant to the Complaint filed in the above matter, and continues to purchase cigarettes in the Commonwealth of Pennsylvania and has paid the tax due pursuant to the Act of July 22, 1970 (P. L. 513) known as the "Pennsylvania Cigarette Tax Act."

Neal F. Bracken

Sworn to and subscribed before me this 8th day of May, 1972.

Linda J. Wondoloski
Notary Public
Philadelphia, Phila. Co., Pa.

My Commission Expires August 18, 1975.

ORDER

(Title Omitted in Printing)

AND NOW, this 20th day of June, 1972, it is ORDERED as follows:

1. It appearing that the plaintiffs seek no relief against the intervenors SETH W. WATSON, JR. and ANNE P. WATSON, his wife, the motion for summary judgment of said intervenors is DENIED without oral argument.

2. Oral argument on the plaintiffs' motion for summary judgment shall be had on Thursday, July 6, 1972, at 10:00 a.m., under the following terms and conditions:

(a) Plaintiffs shall be permitted thirty minutes for argument and the defendants shall be entitled to thirty minutes for argument to be divided among the State and intervenors as they may see fit.

(b) The parties shall direct their arguments to the following:

(i) whether the holding denying the motion to dismiss requires the entry of judgment for the plaintiffs;

(ii) whether on its face and in light of the fact that the majority of students enrolled in Pennsylvania nonpublic schools attend church-related schools, the Act can properly be viewed

as containing a separable provision for aid to parents of children attending nonpublic schools that are not church related.

For the Court,

Joseph S. Lord, III
Ch. J.

PARENT APPLICATION FORM 86a

VERIFIED STATEMENT OF CLAIMANT FOR REIMBURSEMENT OF TUITION FOR THE 1971-72 SCHOOL YEA.

PENNSYLVANIA PARENT ASSISTANCE AUTHORITY

...Pennsylvania Parent Reimbursement Act for nonpublic ...reimbursement of tuition paid (or contracted to ... a maximum of $75 per year for elementary and $150 ... (7th grade) school student who has completed the ... a nonpublic school or schools.

... to be eligible for reimbursement this form must be ... and returned to the Pennsylvania Parent ... (PPAA) no later than July 15, 1972. However, ... such this form immediately after the close of the ...

... this form to PPAA will not be acknowledged ... a self addressed and stamped post card. The ... from PPAA, if the application form is ... and be your receipt of a check on or about ... 1972.

DIRECTIONS FOR PARENTS

A separate application must be used for each nonpublic school in which you have a student enrolled. If you need additional forms contact the school or PPAA.
Read "EXPLANATION" on back of this form, then proceed to do in the following sections:

1. Print name and address of Parent or Guardian.
2. Print information requested for each student enrolled in the nonpublic school identified in section (2) below.
   IMPORTANT: If student's address is different from parent's address shown in section (1), also enter student's name and address on the back of this page.
3. Enter the telephone number and social security number of each parent or guardian.

AFTER END OF SCHOOL YEAR

1. Take the application form to a Notary Public, sign it in his presence and have him complete section (4).
2. Take this application form to the student's school after have school completed session (a).

AFTER SCHOOL CERTIFICATION

- If tuition has been paid, attach a receipted tuition bill. However, completion of section (5) will serve as the necessary receipt.
- If tuition has NOT been fully paid, attach a copy of your signed contract (see "EXPLANATION"). After completing the above steps, mail the application form to PPAA, P.O. Box 1505, Philadelphia, Pennsylvania 19105, not later than July 15, 1972.

...dian Name and Address

Mr. LAST NAME

NUMBER

COUNTY STATE ZIP CODE

SEE REVERSE SIDE FOR COUNTY CODES

Name Mi Last Name Sex

...ATORY WHICH MORE THAN ... THE SAME SCHOOL

ENTER "0" IF TUITION IS PAID
ENTER "0" IF CONTRACT FOR TUITION ...
ATTACH A COPY OF EACH CONTRACT ...

...NUMBER FATHER'S OR GUARDIAN'S SOC. SEC. NO. MOTHER'S SOC. SEC. NO.

...ICATION

...a resident of Pennsylvania and that the ... have been COMPLETED the school year in ... indicated in (2) above and that the ... appearing on the front and back of this form ... to the best of my knowledge, information ... belief, and the actually provided in the ... ACT FOR NONPUBLIC EDUCATION"

...'s Signature

...ATION

...Parent or Guardian has has the ... in the nonpublic school (see ... 1971-72 school year and that the ... tuition has been paid or ... in section (2) above

Subscribed and Sworn (affirmed) to before ...

This _____ Day of _____ 19__

SIGNATURE OF NOTARY PUBLIC

Commission Expires

School name and address (Complete if blank)

...AUTHORIZED AGENT DATE

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EXPLANATION

NONPUBLIC SCHOOL—Any school (other than a public school in the Commonwealth of Pennsylvania) that satisfies the compulsory school attendance requirements of law and meets the requirement of Title VI of the Federal Civil Rights Act of 1964 (Public Law 88-352).

PARENT—A resident of the Commonwealth of Pennsylvania who is a parent of a child enrolled in a nonpublic school or a person standing in loco parentis (a person standing in the place of a parent) to such child.

STUDENT—A resident of the Commonwealth of Pennsylvania who is enrolled in a nonpublic school.

TUITION—All charges made by a nonpublic school to the parent for the education of the student. Where the parent is not charged tuition separately per student, attach explanation of how tuition is charged.

ELEMENTARY—Kindergarten and 1st through 6th grade.

SECONDARY—7th through 12th grade.

RECEIPT—If the school fails to complete section (5), the parent must attach a copy of the nonpublic tuition bill.

CONTRACT—Contract as used herein shall mean a written agreement between a nonpublic school and a parent to pay tuition charges.

MULTIPLE SCHOOLS—Claims for reimbursement for tuition paid at a nonpublic school for student who attended more than one school during the school year [illegible] considered by the Authority, if a separate sheet is attached showing the name and address of the schools and dates of attendance by the child as well as tuition paid.

⑤ STUDENT'S ADDRESS DIFFERENT THAN PARENT

Print student's name and address below for each student listed on the front of this form whose address is different from that shown for parent or guardian in section (1).

FIRST NAME	MI	LAST NAME	STREET ADDRESS	CITY	STATE

County Codes:

[illegible]	19 Cameron	25 Delaware	34 Juniata	[illegible]	[illegible]
02 Allegheny	20 Carbon	26 Elk	35 Lackawanna	58 Snyder	69 Wyoming
03 Armstrong	21 Centre	27 Erie	36 Lancaster	59 Somerset	70 York
04 Beaver	22 Chester	28 Fayette	37 Lawrence	60 Sullivan	71 Yukon
05 Bedford	23 Clarion	29 Forest	38 Lebanon	61 Susquehanna	72 Alaska
06 Berks	24 Clearfield	30 Franklin	39 Lehigh	62 Tioga	73 Delaware
07 Blair	25 Clinton	31 Fulton	40 Luzerne	63 Union	74 Washington
08 Bradford	26 Columbia	32 Greene	41 Lycoming	64 Venango	75 Wisconsin
09 Bucks	27 Crawford	33 Huntingdon	42 McKean	65 Warren	76 West Virginia
10 Butler	28 Cumberland	34 Indiana	43 Mercer	66 Washington	77 Wyoming
11 Cambria	29 Dauphin	35 Jefferson	44 Mifflin	67 Wayne	78 York
12 Cameron	30 Delaware	36 Juniata	45 Monroe	68 Westmoreland	79 Yukon
13 Carbon	31 Elk	37 Lackawanna	46 Montgomery	69 Wyoming	80 Alaska
14 Centre	32 Erie	38 Lancaster	47 Montour	70 York	81 Delaware
15 Chester	33 Fayette	39 Lawrence	48 Northampton	71 Yukon	82 Washington
16 Clarion	34 Forest	40 Lebanon	49 Northumberland	72 Alaska	83 Wisconsin
17 Clearfield	35 Franklin	41 Lehigh	50 Perry	73 Delaware	84 Washington
18 Clinton	36 Fulton	42 Luzerne	51 Philadelphia	74 Washington	85 Wisconsin
19 Columbia	37 Greene	43 Lycoming	52 Pike	75 Wisconsin	86 West Virginia
20 Crawford	38 Huntingdon	44 McKean	53 Potter	76 West Virginia	87 Wyoming
21 Cumberland	39 Indiana	45 Mercer	54 Schuylkill	77 Wyoming	88 York
22 Dauphin	40 Jefferson	46 Mifflin	55 Snyder	78 York	89 Yukon

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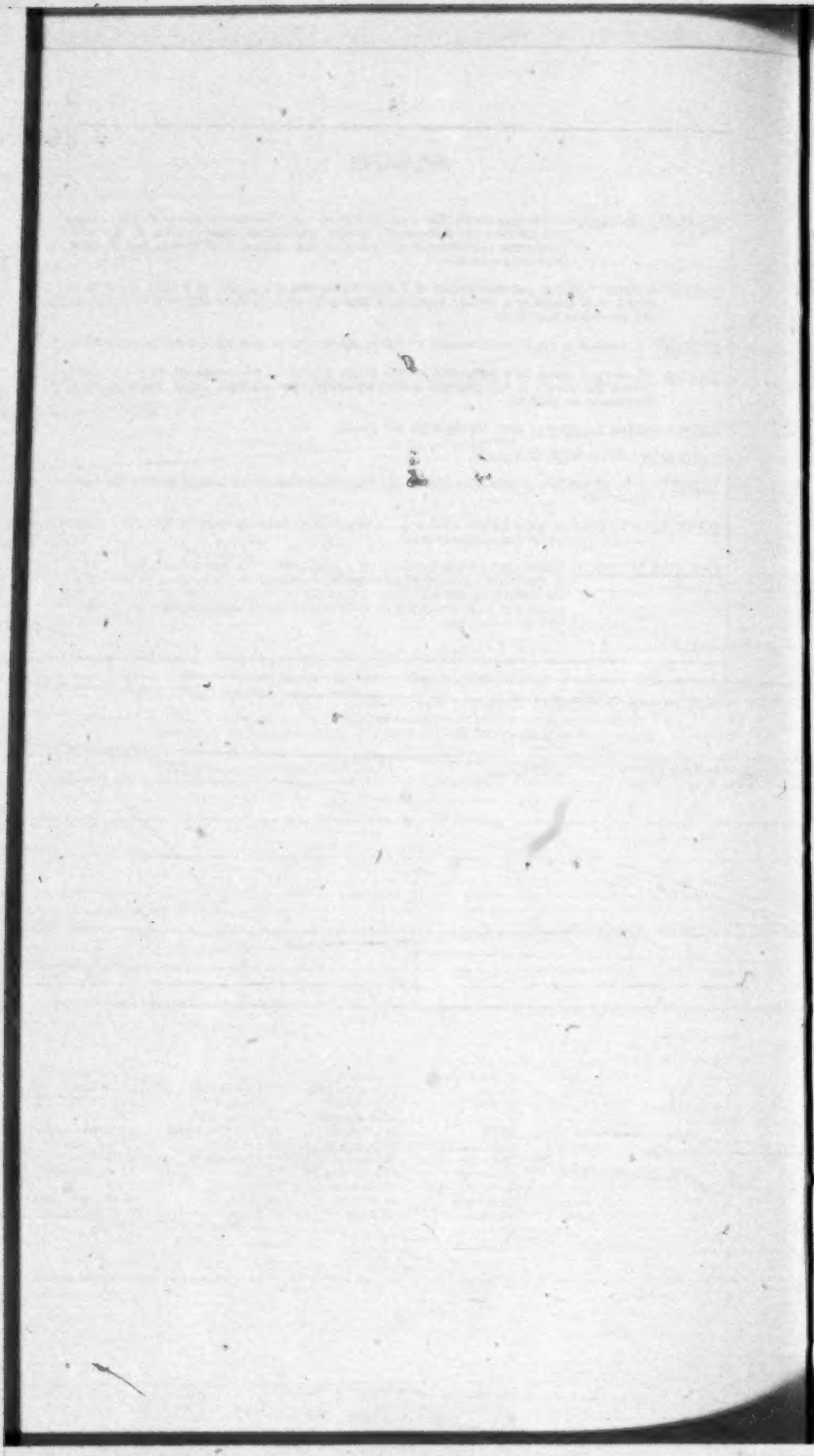

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ORDER
(Title Omitted in Printing)

AND NOW, this 21st day of July 1972, upon consideration of the entire record, the briefs and arguments of the parties, and of amici curiae, and it appearing that more than 90% of the children attending nonpublic schools in the Commonwealth of Pennsylvania are enrolled in schools that are controlled by religious organizations or that have the purpose of propogating and promoting religious faith, and in accordance with our Opinion dated April 6, 1972, denying the motion of the defendant to dismiss, it is ORDERED as follows:

1. The motion of the plaintiffs for summary judgment is GRANTED;

2. The defendant Grace Sloan, and her successors in office, be and they hereby are perpetually enjoined from paying any funds of the Commonwealth of Pennsylvania pursuant to Act No. 92 of August 27, 1971, known as the "Parent Reimbursement Act for Nonpublic Education" either directly or by way of reimbursement to parents of children attending nonpublic schools.

By the Court:
William H. Hastie
Senior Circuit Judge
Joseph S. Lord, III
Chief District Judge
John B. Hannum
District Judge

MOTION TO ALTER OR AMEND JUDGMENT UNDER RULE 59(e)

(Title Omitted in Printing)

Intervenor defendant Crouter in the above matter, by his attorney, Henry T. Reath, Esquire, and Duane, Morris and Heckscher, moves Your Honorable Court to alter or amend its Order and Judgment of July 21, 1972, in the following respects and for the following reasons:

1. On July 21, 1972, a three judge Court, consisting of the Honorable Judges Hastie, Lord and Hannum, handed down its Order, copy of which is attached, granting plaintiffs' motion for summary judgment.

2. Intervenor defendant now moves Your Honorable Court to strike from said Order the following language:

> ". . . and it appearing that more than 90% of the children attending nonpublic schools in the Commonwealth of Pennsylvania are enrolled in schools that are controlled by religious organizations or that have the purpose of propagating and promoting religious faith, . . ."

3. There is no evidence of record that would support the foregoing statement of fact. To the contrary, the allegations bearing on the religious prac-

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tices of schools who charge tuition that would be eligible for parent reimbursement, are contained in paragraph 10 of plaintiffs' complaint, all of which allegations were denied and put at issue in defendant's answer and that of intervenor defendants.

4. There is no evidence in this record as to the number of parents applying for reimbursement under the Act, since all the applications have not yet been received or processed. Furthermore, the application form does not require nor does the Act itself permit answers or inquiry regarding the religious or non-religious practices of said schools. The only eligibility requirement is that the school meet the compulsory educational requirements of the Commonwealth.

5. Furthermore, said allegations were the subject of a special motion to strike filed on behalf of Your Petitioner on the grounds that said allegations were improper and irrelevant conclusions of law, and that any such inquiry into said facts insofar as parents eligible under the Act are concerned, violates their constitutional rights.

WHEREFORE, Your Petitioner respectfully moves the three judge Court to strike from its Order and Judgment the language quoted above in paragraph 2.

Henry T. Reath
for Duane, Morris & Heckscher
Attorneys for Intervenor Defendant, Crouter

MOTION OF JOSE DIAZ, ET AL. FOR AMENDED ORDER

(Title Omitted in Printing)

---

1. The Order of the Court herein, dated July 21, 1972, contains the following language:

> "and it appearing that more than 90% of the children attending nonpublic schools in the Commonwealth are enrolled in schools that are controlled by religious organizations or that have the purpose of propagating and promoting religious faith,"

2. There is no evidence in the record to support the foregoing statement.

3. The Act does not direct or earmark the payment of any funds, directly or indirectly, to any schools, nonpublic or public.

WHEREFORE, defendants Jose Diaz and Enilda Diaz, his wife, William Zimmerspitz and Nancy Zimmerspitz, his wife, F. Carl Kretzmann and Katheryn L. Kretzmann, his wife, Arthur Harvey and Muriel Harvey, his wife, Daniel F. X. Powell and Anna T. Powell, his wife, and Seth W. Watson, Jr. and Anne P. Watson, his wife, respectfully pray the Court to

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enter an Order amending its said Order of July 21, 1972, so as to delete therefrom the aforestated language.

Respectfully submitted,

William Bentley Ball
Joseph G. Skelly
Ball & Skelly
127 State Street
Harrisburg, Pennsylvania
Attorneys for Intervener
Defendants

ORDER

(Title Omitted in Printing)

AND NOW, this 3rd day of August, 1972, it is ORDERED that the motion of the intervenor defendant Crouter to alter or amend the judgment under Rule 59(e) be and it hereby is DENIED.

For the Court:
Joseph S. Lord, III
Ch. J.

ORDER

(Title Omitted in Printing)

AND NOW, this 4th day of August, 1972, it is ORDERED that the motion of JOSE DIAZ and ENILDA DIAZ, his wife, WILLIAM ZIMMERSPITZ and NANCY ZIMMERSPITZ, his wife, F. CARL KRETZMANN and KATHERYN L. KRETZMANN, his wife, ARTHUR HARVEY and MURIEL HARVEY, his wife, DANIEL F. X. POWELL and ANNA T. POWELL, his wife, and SETH W. WATSON, JR. and ANNE P. WATSON, his wife, to amend the order of July 21, 1972 be and it hereby is DENIED.

For the Court:
Joseph S. Lord, III
Ch. J.

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SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

January 22, 1973

Henry T. Reath, Esq.
Duane, Morris & Heckscher
1600 Land Title Bldg.
Philadelphia, Pa. 19110

RE: SLOAN v. LEMON No. 72-459;
CROUTER v. LEMON, No. 72-620

Dear Sir:

The Court today took the following action in the above cases:

> "In these cases probable jurisdiction is noted. The cases are consolidated and a total of one hour is allotted for oral argument. These cases are to be argued immediately following consolidated cases Nos. 72-694, 72-753, 72-791 and 72-929."

Enclosed are memorandums describing the time requirements and procedures under the Rules.

The additional docketing fee of $50, Rule 52(a) is due and payable in No. 72-620.

Very truly yours,

MICHAEL RODAK, JR., *Clerk*
By
(Mrs.) Helen K. Loughran
Assistant Clerk

Supreme Court of the United States

Nos. 72-459 and 72-620

Grace Sloan, as State Treasurer of the Commonwealth of Pennsylvania, et al.,

Appellants,

v.

Alton J. Lemon, et al.; and

Henry E. Crouter,

Appellant,

v.

Alton J. Lemon, et al.

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Alton J. Lemon, et al.

APPEALS from the United States District Court for the Eastern District of Pennsylvania.

The statements of jurisdiction in these cases having been submitted and considered by the Court, probable jurisdiction is noted. The cases are consolidated and a total of one hour is allotted for oral argument and to be argued immediately following consolidated cases Nos. 72-694, 72-753, 72-791, and 72-929.

January 22, 1973

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KODAK,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-459

GRACE SLOAN, as State Treasurer of the Commonwealth of Pennsylvania,
—and—
JOSE DIAZ and ENILDA DIAZ, his wife, WILLIAM ZIMMERSPITZ and NANCY ZIMMERSPITZ, his wife, F. CARL KRETZMANN and KATHERYN L. KRETZMANN, his wife, ARTHUR HARVEY and MURIEL HARVEY, his wife, DANIEL F. X. POWELL and ANNA T. POWELL, his wife, SETH W. WATSON, JR., and ANNE P. WATSON, his wife, and HENRY E. CROUTER,
Appellants,
v.
ALTON J. LEMON, NEAL F. BRACKEN, and BENJAMIN S. LOWENSTEIN, *Appellees.*

On Appeal from the United States District Court for the Eastern District of Pennsylvania

JURISDICTIONAL STATEMENT OF APPELLANTS GRACE SLOAN, AS STATE TREASURER OF THE COMMONWEALTH OF PENNSYLVANIA, JOSE DIAZ AND ENILDA DIAZ, HIS WIFE, WILLIAM ZIMMERSPITZ AND NANCY ZIMMERSPITZ, HIS WIFE, F. CARL KRETZMANN AND KATHERYN L. KRETZMANN, HIS WIFE, ARTHUR HARVEY AND MURIEL HARVEY, HIS WIFE, DANIEL F. X. POWELL AND ANNA T. POWELL, HIS WIFE, SETH W. WATSON, JR., AND ANNE P. WATSON, HIS WIFE.

(Signatures on page 2 of cover)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No.

GRACE SLOAN, as State Treasurer of the Commonwealth of Pennsylvania,
—and—
JOSE DIAZ and ENILDA DIAZ, his wife, WILLIAM ZIMMERSPITZ and NANCY ZIMMERSPITZ, his wife, F. CARL KRETZMANN and KATHERYN L. KRETZMANN, his wife, ARTHUR HARVEY and MURIEL HARVEY, his wife, DANIEL F. X. POWELL and ANNA T. POWELL, his wife, SETH W. WATSON, JR., and ANNE P. WATSON, his wife, and HENRY E. CROUTER,
Appellants,

v.

ALTON J. LEMON, NEAL F. BRACKEN, and BENJAMIN S. LOWENSTEIN, *Appellees.*

On Appeal from the United States District Court for the Eastern District of Pennsylvania

---

JURISDICTIONAL STATEMENT

Appellants appeal from the final Order entered on July 21, 1972, by a District Court panel of three judges, perpetually enjoining the Appellant Grace Sloan, and her successors in office, from paying any funds of the Commonwealth of Pennsylvania pursuant to Act 92 of

August 27, 1971, known as the Parent Reimbursement Act for Nonpublic Education, to parents of children attending nonpublic schoole.

OPINION BELOW

The only Opinion of the three-judge District Court for the Eastern District of Pennsylvania in this case was entered on April 6, 1972, prior to joinder of issue by Answer in the case, and as the basis for denial of motions to dismiss made by Appellants (Defendants below). The District Court's Order of July 21, 1972, recites said Order (disposing of a later Motion for Summary Judgment) to be in accordance with that Opinion. The Opinion is reported in 346 F.Supp. 1356 (1972).

JURISDICTION

This action was brought pursuant to 28 U.S.C. §§ 1331, 1343(3), 2201 and 2202 to enjoin the enforcement of a statute of the Commonwealth of Pennsylvania as being in violation of the First Amendment to the Constitution of the United States. The final decree of the District Court was entered on July 21, 1972, and is set forth in the Appendix hereto, at page 1a. Appellants Diaz, Zimmerspitz, Kretzmann, Harvey, Powell and Watson filed their Notice of Appeal in the District Court on August 8, 1972; Appellant Grace Sloan, as State Treasurer of the Commonwealth of Pennsylvania, filed her Notice of Appeal on August 14, 1972. Copies of both Notices of Appeal are set forth in the Appendix at pages 18a and 19a respectively.

The jurisdiction of this Court to review the judgment of the District Court by direct appeal is conferred by Title 28 U.S.C., Sections 1253 and 2101(b). The most recent case sustaining the jurisdiction of this Court to

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review the judgment in this case on direct appeal is *Lemon* v. *Kurtzman,* —— U.S. ——, 32 L. ed. 2d. 330 (1972).

STATUTE INVOLVED

The statute involved is Act 92 of the Laws of Pennsylvania, 1971, known as the Parent Reimbursement Act for Nonpublic Education, the full text of which is set forth in the Appendix, commencing at page 20a.

QUESTIONS PRESENTED

The Act provides that the parent of a child who has completed the preceding school year in a nonpublic school in which the requirements of the compulsory school attendance law and of Title VI of the federal Civil Rights Act of 1964 are met, and for whom the parent paid tuition, shall be entitled to receive a reimbursement payment limited to $75.00 (if the attendance was in a elementary school) or $150.00 (if the attendance was in a secondary school). This payment to the parent is not earmarked for any school and may be used by the parent unrestrictedly, in any way that he desires, whether for education, family maintenance or otherwise.

1. Does this Act have a primary effect that advances religion?

2. Does the denial of the benefits of the Act to a parent who had paid tuition for a child enrolled in a nonpublic non-church related school deny such parent the equal protection of the laws?

3. Does the denial of the benefits of the Act to a parent who had paid tuition for a child enrolled in a nonpublic church-related school deny such parent the equal protection of the laws?

STATEMENT OF THE CASE

1. The Statute Involved

Act 92 of 1971 provides that the state shall make payments to any parent who had paid tuition, for the already completed school year, for the education of a child in a nonpublic school. The specified payments are in the flat amount of $75.00 for an elementary school student and $150.00 for a high school student. The payments are not payments of tuition, and are in no way related to the tuition scales of different schools or to the amount of tuition costs incurred by any particular parent. The payments are not required by the statute to be paid over to any school or devoted to educational uses: the parent receives them unearmarked and without any attached condition as to their disposition. The student must have been enrolled in a school wherein the requirements of the compulsory attendance law may be fulfilled and which meets the requirements of Title VI of the U. S. Civil Rights Act of 1964.

In accordance with the Act, the Pennsylvania Assistance Authority reimburses the parent on the basis of the parent's verification that he had paid tuition for the past school year for a child enrolled in a nonpublic school as defined in the Act. (Section 6). The Act specifically precludes the Authority from exercising any "direction, supervision or control over the policy determinations, personnel, curriculum, program of instruction or any other aspect of the administration or operation of any nonpublic school or schools". (Section 4).

In Section 2 the Pennsylvania General Assembly stated its purpose in enacting Act 92:

> ". . . in order to reimburse parents partially for this service so vitally needed by the Common-

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wealth, and in order to foster educational opportunity for all children . . ."

The word "service", refers back to the concluding sentence of subparagraph (4) of Section 2:

"Therefore, parents who maintain students in nonpublic schools provide a vital service to the Commonwealth."

The premises upon which that conclusion rests are set forth in legislative findings contained in the four subsections of Section 2:

1. Parents who send their children to nonpublic schools assist the State in reducing the rising costs of public education.
2. The welfare of the Commonwealth requires that children be assured ample opportunity to develop their intellectual capacities.
3. Inflation and rising educational cost now imperil the ability of parents to continue to support nonpublic education.
4. Any substantial transfer of nonpublic school children to public schools in Pennsylvania will entail an intolerable public financial burden and seriously jeopardize present standards of public education.

Act 92, as a bill in the legislature, was known as House Bill 1379. The bill, with 67 sponsors, passed both the House and the Senate with comfortable majorities.[1] It was signed into law by the Governor on August 27, 1971.

[1] H. 1379 passed the House by a vote of 132 to 63. It was then amended in the Senate (to change the percent of tax revenue in Section 5 from 25% to 23%) and passed as amended by a vote of 36 to 12. The bill was then returned to the House for concurrence where it passed by a vote of 173 to 16.

2. The Proceedings Below

On September 13, 1971, the Appellees (the Plaintiffs below) brought this action, naming the State Treasurer as defendant. The Complaint alleged that the Act violates the Establishment, Free Exercise and Equal Protection Clauses of the Constitution and sought an injunction against the paying of any funds pursuant to the Act.

Thereafter, twelve parents, having children enrolled in nonpublic schools in Pennsylvania, moved under Rule 24(a) for intervention of right as parties defendant, stating that, by virtue of being prime beneficiaries of the Act, they had an interest in the subject of the action distinct from that of the named party defendant, the State Treasurer. Ten of these parents are parents of children in nonpublic schools which are church-related, while two of the parents, Seth W. Watson and Anne P. Watson, his wife, are parents of a child who attends a nonsectarian, nonpublic school. The District Court granted the parents' Rule 24(a) motion.[2]

All parties defendant then moved, under Rule 12(b)(6), to dismiss the Complaint for failure to state a claim upon which relief can be granted. The District Court, on April 6, 1972, issued an Order that the motion to dismiss be denied. Although at this point no Answer had been filed, nor any motion for judgment by plaintiffs, the Order was accompanied by an Opinion declaring the Act unconstitutional under the Establishment Clause. That is the only Opinion which has been rendered in the case. Its contents are discussed *infra*.

On April 28, 1972, the Court granted motions of the defendants to dismiss those counts of the Complaint

[2] The separate intervention of a parent, Henry E. Crouter, was likewise granted.

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relating to the Free Exercise and Equal Protection Clauses. (Appendix, page 16a). On the same date the defendant Grace Sloan, State Treasurer, filed her Answer to the Complaint. On May 1, 1972, the parent intervener defendants Jose Diaz, *et al.*, filed their Answer to the Complaint, stating that to deny any intervener defendants the benefits of the Act solely because their children attend church-related schools, or to deny any intervener defendants the benefits of the Act solely because their children attend nonpublic non-church related schools, would be to deny such intervener defendants the equal protection of the laws.

The defendants Seth W. Watson and Anne P. Watson, his wife, on May 3, 1972, moved for summary judgment. Their motion was supported by an affidavit which disclosed that they are eligible to receive payments under the Act and are parents of a child who is enrolled in a nonpublic non-church related school. The Court, on June 20, 1972, denied this motion without oral argument on the ground that "the plaintiffs seek no relief against the interveners Seth W. Watson, Jr., and Anne P. Watson, his wife". In the same Order the court requested oral argument on the question of whether the Act "can properly be viewed as containing a separable provision for aid to parents of children attending nonpublic schools that are not church related". (Appendix, page 16a). The plaintiffs also moved for summary judgment on May 3, 1972. On July 21, 1972, the District Court granted that motion, "it appearing that more than 90% of the children attending nonpublic schools in the Commonwealth of Pennsylvania are enrolled in schools that are controlled by religious organizations or that have the purpose of propagating and promoting religious faith..." (Appendix, page 17a).

The intervener defendants Jose Diaz, *et al.*, on July 31, 1972, moved that the judgment be amended on the ground that there was no evidence in the record to support the Court's foregoing statement and, further, on the ground that the Act does not direct or earmark the payment of any funds, directly or indirectly, to any schools, nonpublic or public. On August 4, 1972, the Court denied that motion.

Thus, although its Opinion of April 6, 1972, was rendered prior to the Answer of the parent interveners which raised Equal Protection claims, the court below never issued a subsequent opinion addressing itself to those claims. Furthermore, after ruling on the Motions to Dismiss, and denying the Motion for Summary Judgment by Seth W. and Anne P. Watson, and the court having asked for argument on the issue of whether the Act was severable in its application to them, the court, nevertheless, omitted to render any opinion respecting that issue.

The Opinion of the District Court states that the Supreme Court has developed three tests for determining whether a particular program offends the Establishment Clause: (1) whether the statute has a "secular legislative purpose", (2) whether "its principal or primary effect [is] one that neither advances nor inhibits religion", and (3) whether the statute fosters "an excessive government entanglement with religion". (Appendix, page 5a). The District Court found that Act 92 passed the first test. The Court did not apply or discuss the third test. The Court said that the Act violates the Establishment Clause for the following reasons:

1. ". . . the effect of the Act is to aid the schools and therefore the failure of the state to insure that

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the funds are restricted to secular education or general welfare services renders the Act unconstitutional." (Appendix, page 12a).

2. ". . . even if we held that the Act does not aid sectarian schools, we must still conclude that the Act supports religion because it aids parents in providing a religious education for their children." (Appendix, page 14a.)

THE QUESTIONS ARE SUBSTANTIAL

Act 92 is a unique statute, providing a program not hitherto reviewed by this Court. There can be no doubt that it is important legislation, since it is the response of a heavy preponderance of the legislature [3] of one of the most populous and socially representative [4] states of the Union to a problem which many leaders of our nation have deemed to be of great consequence.[5]

---

[3] See p. 5 *ante* for recapitulation of the vote in both houses.

[4] Pennsylvania, third in population among the fifty states, is both an industrial and an agricultural state, extending from the Atlantic seaboard to the Midwest. It embraces the great multi-racial population centers of Philadelphia and Pittsburgh, prosperous farming communities, the economically depressed coal regions, railroad towns, and "Appalachia'" regions. It includes some of the foremost banking and financial centers in the nation, and is one of the chief homes of organized labor in the United States. Ethnically, its population is very diverse. Politically, it is about evenly divided between the two major parties. Religiously, its majority is Protestant, the remaining one-fourth of its people being largely Roman Catholic, but with substantial Jewish, Greek Orthodox, and Russian Orthodox numbers. About one-quarter of Pennsylvania children attend nonpublic schools (a majority of which are religiously affiliated schools) while three-quarters are in public schools. See, generally, THE PENNSYLVANIA MANUAL, 1970-1971.

[5] See, *e.g.* Message on Education Reform of the President of the United States, March 3, 1970, 9.

The Act's legislative finding and declaration of intent spell out the following as the core concept of Act 92:

Parents who enroll their children in nonpublic schools wherein compulsory attendance law requirements may be fulfilled thereby contribute to the public welfare, because, *de facto,* they save the state money while, at the same time, providing an education for young citizens. Those two factors can fairly be described as a "service" to the Commonwealth. The Act is aimed at affording financial help to the contribution of this service. The money paid the parents is *unearmarked,* and the parents in question are aided in their overall economy, their households, their economic level. Out of this help they are aided to, but not required to, continue educating their children in nonpublic schools (which includes, of course, church-related schools). Thus the Act fosters "educational opportunity for all children".

1. THE ESTABLISHMENT CLAUSE QUESTIONS

The court below correctly stated the three tests under the Establishment Clause, which this legislation would have to withstand relating, respectively, to "secular legislative purpose", "primary effect that neither advances nor inhibits religion", and excessive "government entanglement with religion". It found Act 92 to fail only the "primary effect" test. This the Court did, first, by saying that the Act provides, in effect, a subsidy to sectarian schools unrestricted to secular objectives, and secondly, that it "encourages" parents to send their children to church-related schools because a "possible and quite likely" use of the payments by the parents will be "to continue to pay tuition at sectarian schools".

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Act 92 cannot be read to spell out a school subsidy. Its reference to schools, school children, education and educational cost do not render it an act subsidizing schools. Anyone familiar with family economics in Pennsylvania at the present hour, realizes that the cost, due to taxation and inflation, of educating children, is a major cost to most parents in the state. But to parents who respond to undeniable commands of conscience by educating their children in sectarian and other nonpublic schools, this cost is particularly burdensome. The legislature, in devising this piece of social legislation, could well take into account that factor, and expressly note it, in writing a provision for family or parental economic relief, without at the same time creating, directly or indirectly, any school subsidy. The aim, in statutory construction, "is to save and not to destroy." *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937). The legislative finding and declaration of policy must and can be read so as to preserve the Act.

In pursuit of its argument that the unearmarked payments to parents are, in fact, subsidies to schools, the District Court reasoned that, since "parents may receive payments [under the Act] solely because they have paid tuition at a church-related school", therefore such payments are, in legal effect, payments of tuition. But no provision of Act 92, directly or by implication, requires a parent to hand the payment over to any school-church-related or otherwise. And the court did not establish (nor could it have) any nexus between the amount of tuition which had been antecedently paid by the parent and the flat, uniform amount of welfare benefit afforded by the Act to all parents of nonpublic school children. No tuitions are paid under this Act.

The lower court well recognized the difficulty of attempting to establish Act 92 as providing a subsidy to sectarian schools, or a tuition earmarked for them. It could not, of course, say that parents *will, in fact,* send their children to sectarian schools due to the payments. So it dealt with the point by saying that they *might.* To resolve the question of whether the Act has any necessary primary effect of advancing religion, the court turned to deemed probabilities, here saying that in *Tilton* v. *Richardson,* 403 U.S. 672 (1971), the Supreme Court had

> "... found the *possibility* of such [religious] use enough to strike down the provision of the statute which permitted the unrestricted use of the buildings after twenty years. It is clear that a *possible and quite likely use* of the aid under review is to enable parents to continue to pay tuition at sectarian schools." (Appendix, page 13a. Emphasis supplied).

Thus the lower court has interposed a new test (never in fact pronounced by the Supreme Court) for laws respecting an establishment of religion. The Supreme Court has never held any law invalid on the principle that it encourages religion. If that were so, laws providing for tax exemption of churches would be invalid. If that were so, the compulsory attendance laws of all fifty states would be invalid; it is by virtue of such laws that six million children in the United States may legally attend parochial schools. If that were so, the following statements of this Court in *Walz* v. *Tax Commission,* 397 U.S. 664, 671 (1970) must now be deemed repudiated:

> "Surely, bus transportation and police protection to pupils who receive religious instruction *'aid'* that particular religion to maintain schools that

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> plainly tend to assure future adherents to a particular faith by having control of their total education at an early age." *Walz, supra,* at 671. (Emphasis supplied).
>
> "'*When the state encourages religious instruction . . . it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to our spiritual needs.*'" *Id.* at 672. (Emphasis by the Court).

This Court said, in *Lemon* v. *Kurtzman,* 403 U.S. 602, 612 (1971) that "the three evils against which the Establishment Clause was intended to afford protection . . ." are "sponsorship, financial support, and active involvement of the sovereign in religious activity". Neither sponsorship, financial support, or active involvement of the state in religious activity are discoverable in Act 92.

Nor can any rule of "possible and quite likely" serve as a constitutional standard for deciding that an enactment of the legislature of a state is a law respecting an establishment of religion. The parent can indeed pay over to a church money which he receives under the Act; but in that respect he differs in no wise from a recipient of public assistance in Pennsylvania, who likewise may pay over to a church the unearmarked assistance which he receives.

The District Court's use of this Court's decision in *Tilton* v. *Richardson* calls for correction. The Supreme Court, in *Tilton,* did not state any test of "significant risk" or enter upon any formula for the weighing of probabilities that the buildings in question would, or would not, after the twenty year period, be used for religious purposes. The facts of *Tilton* were that

buildings were constructed on sectarian college campuses at public expense and under state restrictions limiting their use to secular functions. The Supreme Court struck down that part of the legislation in question which limited the government's power of recapture to a twenty year period for violation of those restrictions. *Tilton* would be usefully analogous here, only if funds under Act 92 were consigned to sectarian schools, with restrictions (of limited duration) that they be used only for secular purposes. Such is not the case.

Act 92 plainly has no primary effect that advances religion.

2. THE EQUAL PROTECTION QUESTIONS

a. Parents Whose Children Attended Non-Church-Related Schools

Important issues are also presented to the Court by the affirmative defenses raised by the parent interveners. Two of these, Seth W. Watson, Jr. and Anne P. Watson, his wife, are clearly denied the equal protection of the laws by virtue of the lower court's ruling. Even under that court's erroneous view that the Act calls for an illegal subsidy to sectarian schools, the Watson parents, whose child attended a nonsectarian school, must be allowed the benefits of the Act, since in no way can payment to them possibly raise any Establishment Clause issue. The severability clause of the Act expressly states that

> "If a part of this act is invalid, in one or more of its *applications* the part remains in effect in all valid *applications* that are severable from the invalid *applications.*" (Section 10. Emphasis supplied).

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No construction of Act 92, limiting its application to parents whose children attended sectarian schools is possible, the Act (Section 3(2)) defining a "nonpublic school" as *"any"* school wherein, *inter alia,* the compulsory attendance requirements of law may be met. The legislative intent must be primarily determined from the language of the statute itself. *Commonwealth ex rel. Cartwright* v. *Cartwright,* 350 Pa. 638, 645 (1945). To interpret Section 3(2) to read: "any *sectarian* school, other than a public school", is to write a denial of equal protection on the very face of the Act, since no possible basis could be discovered for affording the benefits of the Act to parents whose children met compulsory attendance requirements through a sectarian school while denying them to parents whose children met exactly the same requirements through a nonsectarian school. This discrimination would be highlighted were it to be stated, as did the court below, that parents of nonsectarian school children constitute a minority of the Act's designated beneficiaries. The General Assembly, by providing the foregoing language respecting severance in application, stated its plain intention to preserve the statute for all possible beneficiaries.

b. Parents Whose Children Attended Church-Related Schools

The other intervening parents, Jose and Enilda Diaz, William and Nancy Zimmerspitz, F. Carl and Katheryn Kretzmann, Arthur and Muriel Harvey and Daniel F. X. and Anna T. Powell, are parents whose children attended Catholic, Jewish and Protestant church-related schools. They find themselves confronted by two absolute commands: that of the Compulsory Attendance Law and that of their religious conscience. Act 92 provides a public welfare benefit

in the form of payments to parents who fall within a rationally based class of persons who have particular economic need due to the fact of their supporting both public education and (by virtue of the foregoing commands) nonpublic education. The court below says that a parent must be excluded from participation in the public welfare benefit solely on the ground that, in the previous school year, he chose to have his child fulfill the Compulsory Attendance Law through enrollment in a religious-affiliated school. The court thus sets up religion as the standard for determination of participation in public welfare benefits. This attempt to stretch the Establishment Clause into a suppressant of Equal Protection rights is manifestly mistaken.

The Supreme Court has repeatedly discountenanced the view that the Establishment Clause—though cast in absolute terms—is to be read as an absolute. Instead, it has stressed that the guiding principle of its interpretation is neutrality. *Everson* v. *Board of Education,* 330 U.S. 1, 18 (1947); *Walz* v. *Tax Commission,* 397 U.S. 664, 669 (1970):

> "The general principle deducible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed government acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference." *Id.* at 669.

Intervener Defendants Jose Diaz, *et al.* do not suggest that they have a constitutional right to have the State make payments to parents of nonpublic school children which will enable them better to bear financial

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burdens caused by having to pay taxes for the support of public schools while also having to obey commands of religious conscience through supporting sectarian schools. (*Cf., Brusca* v. *State of Missouri ex rel. State Board of Education,* 332 F.Supp. 275, *aff'd.,* memorandum decision, —— U.S. ——, 92 S.Ct. 1493 (1972). They do, however, say that, where the legislature, in its wisdom, has determined to provide public welfare benefits to all parents within a rationally determined class, the court may not impose a standard which will disqualify certain parents from participating in those benefits *solely because they had exercised a choice —an act of the will—based upon religious conscience,* of schools for their children which public policy says are acceptable schools.

The invidiousness of such classification is highlighted by the following:

1. In any such disqualification, it is the prospect of the *exercise of religious conscience by the parents,* and not actually the religious character of the school, which is determinative. That is because, as has been seen, the schools are not funded under the Act.

2. Those parents are disqualified from receiving, not school tuition payments (none are payable under Act 92), but what are, in fact, *general* assistance payments. Thus the penalty involved in the disqualification extends not only to schooling (should the parent decide to use the money directly for educating his child) but also, for example, to food or clothing or household maintenance (should the parent decide to use the money for such purpose).

3. For many individuals, there is no realistic choice but to obey the mandate which a religious conscience speaks. *Sherbert* v. *Verner,* 374 U.S. 398, 404 (1963). For Intervener Defendants, however, that mandate

is coupled with a legal mandate of the State, that, under criminal penalty, a parent must send his child to a school in which the requirements of the Compulsory Attendance Law may legally be met. The court below asserts that the State can no more properly provide funds under Act 92 than it could provide funds to individuals to enable them to operate a church. The flaw in that position lies in part, however, in the fact that the law does not compel people to go to church, while it does compel a parent to send his child to a school (while, in addition, compelling the parent to pay for the support of public schools). Since the lower court did not dispute the legislative judgment that a vast number of parents of nonpublic school children actually need the payments in question (and, in fact, agreed that "the Act expresses a legitimate secular objective" Appendix, page 5a), it is clear that the exclusion from the benefits of the Act of those parents who desire an education for their children in a religiously affiliated school will impede them either in obeying their conscience or in obeying the law.

The effect, then, of the ruling by the District Court, disqualifying a parent because his child attended a sectarian school, is to create two classes of parents indistinguishable from each other except for the fact that the disqualified parent has exercised his religious liberty to educate his child in a school which public policy recognizes for accommodation of the religious conscience.

Classifications based on religion are fully as abhorrent as classification based on race, lineage or alienage. Certainly the interest of Intervener Defendants, both in education and in the exercise of religious freedom, must be deemed a "fundamental interest" for purposes of the Equal Protection Clause.

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CONCLUSION

In view of the foregoing, it is submitted that the District Court was in error in concluding that Act 92 is unconstitutional, and that the questions presented by this appeal are substantial, and of major public importance, warranting plenary consideration by this Court.

Respectfully submitted,

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APPENDIX

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APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 71-2223

ALTON J. LEMON, NEAL F. BRACKEN AND BENJAMIN S. LOEWENSTEIN

v.

GRACE SLOAN, State Treasurer of the Commonwealth of Pennsylvania

JOSE DIAZ and ENILDA DIAZ, his wife; WILLIAM ZIMMERSPITZ and NANCY ZIMMERSPITZ, his wife; F. CARL KRETZMANN and KATHERYN L. KRETZMANN, his wife; ARTHUR HARVEY and MURIEL HARVEY, his wife; DANIEL F. X. POWELL and ANNA T. POWELL, his wife; and SETH W. WATSON, JR. and ANNE P. WATSON, his wife; and HENRY R. CROUTER, *Interveners*

BEFORE: WILLIAM H. HASTE, Senior Circuit Judge JOSEPH S. LORD, III, Chief District Judge JOHN B. HANNUM, District Judge

Opinion

April 6, 1972

By JOSEPH S. LORD, III, Chief District Judge

Plaintiffs brought this suit to declare the Pennsylvania Parent Reimbursement Act for Nonpublic Education [1] (the "Act") unconstitutional and to enjoin its operation. The Act is challenged as violative of the Establishment and Free Exercise Clauses of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment. This court has jurisdiction of the controversy pursuant to

[1] Act 92 of the Pennsylvania General Assembly, August 27, 1971. Appendix A, *infra*.

28 U.S.C. § § 1331, 1343(3), 2281 and 2284. Presently before the court are motions of defendant and intervening defendants to dismiss the complaint for lack of standing and failure to state a claim upon which relief can be granted.

The plaintiffs are citizens, residents and taxpayers of the Commonwealth of Pennsylvania who have paid the Pennsylvania cigarette tax which finances the Act. Plaintiff Lemon is also the parent of a Negro child attending a public school in Pennsylvania. Defendant Sloan is State Treasurer of the Commonweath of Pennsylvania and is sued in that capacity. Intervening defendants are citizens, residents and taxpayers of the Commonwealth of Pennsylvania. Interveners are parents of one or more students who are enrolled in nonpublic schools in Pennsylvania and interveners are eligble for tuition reimbursement payments under the Act.

The Act provides for the reimbusement of tuition payments to parents whose children have completed the school year in a nonpublic school located in Pennsylvania which fulfills the compulsory school attendance requirements under Pennsylvania law and the requirements of Title VI of the Civil Rights Act. of 1964.[2] In its legislative findings and declaration of policy, the Pennsylvania General Assembly determined that parents who send their children to nonpublic schools assist the state in reducing the rising cost of public education. The General Assembly found that if inflation and rising costs of education force parents of children now enrolled in nonpublic schools to transfer a substantial number of their children to public schools, "an enormous added financial, educational and administrative burden would be placed upon the public schools and upon

[2] Title VI prohibits discrimination on the ground of race, color, or national origin in programs receiving federal financial assistance. 42 U.S.C. § 2000d *et seq.*

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the taxpayers of the state.[3] Therefore, in order to insure that parents can continue to aid the state by sending their children to nonpublic schools and in order to foster educational opportunity for all children, the General Assembly established the tuition reimbursement program.

The first ground of defendants' motion to dismiss is that the complaint fails to state a claim under the Establishment Clause of the First Amendment upon which relief can be granted.[4] Plaintiffs allege that the Act authorizes payment for the tuition of students in educational institutions which

> "* * * (1) are controlled by churches or religious organizations, (2) have as their purpose the teaching, propagation and promotion of a particular religious faith, (3) conduct their operations, cirriculums [sic] and programs to fulfill that purpose, (4) impose religious restrictions on admissions, (5) require attendance at instruction in theology and religious doctrine, (6) require attendance at or participation in religious worship, (7) are an integral part of the religious mission of the sponsoring church, (8) have as a substantial or dominant purpose the inculcation of religious values, (9) impose religious restrictions on faculty appointments, or (10) impose religious restrictions on what the faculty may teach." ¶ 10 Complaint.[5]

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[3] Section 2(4), Act 92, Appendix A.

[4] Defendants concede and we find that plaintiffs have standing to sue under the Establishment Clause. *Flast* v. *Cohen*, 392 U.S. 83 (1968).

[5] Defendant intervener Crouter has moved under F. R. Civ. P. 12(f) to strike paragraph 10 of plaintiff's complaint as immaterial and as requiring inquiry into the religious practices and character of schools to which parents choose to send their children in violation of the parents' rights of free exercise of religion, privacy, and freedom of expression.

F.R. Civ. P. 12(f) provides that "the court may order stricken from any pleading, any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Defendant maintains that the allegations of paragraph 10 concerning the religious char-

For the purpose of considering the motion to dismiss, we must accept these allegations as true. Therefore, the issue before us is whether the Establishment Clause prohibits the state from reimbursing parents for the tuition costs of sending their children to church-related elementary and secondary schools.

The Establishment Clause was intended to protect against "sponsorship, financial support, and active involvement of the sovereign in religious activity." *Walz* v. *Tax Commission,* 397 U.S. 664, 668 (1970). *See also* Everson v. Board of Education, 330 U.S. 1 (1947), *Engel* v. *Vitale,* 370 U.S. 421 (1962).

> "Every analysis must begin with the candid acknowledgment that there is no single constitutional caliper which can be used to measure the precise degree to which these three factors are present or absent. Instead, our analysis in this area must begin with a consideration of the cumulative criteria developed over many years and applying to a wide range of governmental action challenged as violative of the Establishment Clause."
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> *Tilton* v. *Richardson,* 403 U.S. 672, 677-678; 29 L.Ed. 2d 790, 798 (1971).

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acter of nonpublic schools are constitutionally irrelevant because the Act does not give aid to schools, but to parents. However, the issue of whether the Act aids religious schools or aids parents to provide a religious education for their children is one of the issues in dispute in this litigation, and the allegations of paragraph 10 are certainly relevant to the plaintiffs' claims.

> "• • • The motion to strike should be granted only when the pleading to be stricken has no possible relation to the controversey." *Brown and Williamson Tobacco Corp.* v. *U.S.,* 201 F.2d 819, 822 (C.A.6, 1953). *See also Augustus* v. *Bd. of Public Instruction,* 306 F.2d 862, 868 (C.A. 5, 1962), 2A J.Moore, *Federal Practice* § 12.21[2] (2d ed. 1968).

Defendant's further objection concerning the constitutionality of inquiring into the religious character of the schools is premature and should be raised once such information is actually sought. We therefore deny defendant intervener's motion to strike paragraph 10.

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In *Lemon* v. *Kurtzman*, 403 U.S. 602, 612-613; 29 L.Ed.2d 745, 755 (1971), the Supreme Court restated the three tests it has developed for determining whether a particular program offends the Establishment Clause.

> "* * * First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor prohibits religion, *Board of Education* v. *Allen*, 392 U.S. 236, 243, 20 L.Ed.2d 1060, 1065, 88 S.Ct. 1923 (1968); finally, the statute must not foster 'an excessive government entanglement with religion.' *Walz, supra,* at 674, 25 L.Ed.2d at 704."

The stated legislative purpose of the Act is to aid parents to continue to send their children to nonpublic schools thereby fostering educational opportunities for both public and nonpublic school children. The legislative findings and declaration of policy indicate that the General Assembly is concerned with maintaining the present standards of public education which it finds would be seriously jeopardized if parents of nonpublic school children could no longer afford tuition costs and were forced to send their children to public schools. "A State always has a legitimate concern for maintaining minimum standards in all schools it allows to operate." *Lemon, supra,* 403 U.S. at 613. Therefore, according the stated legislative intent appropriate deference, we conclude that the Act expresses a legitimate secular objective consistent with the Establishment Clause. *See Allen, supra,* 392 U.S. 243; *Lemon, supra,* 403 U.S. at 613; *Tilton, Supra,* 403 U.S. at 678-679,

We must next determine whether the Act has the primary effect of advancing religion. The very existence of this "test" reflects the Court's determination that there may be some forms of aid to church-related activities which do not involve that sponsorship, financial support or the active involvement of the state in religious activity which the Establishment Clause was intended to prevent. Al-

though the Court "can only dimly perceive the boundaries of permissible government activity in this sensitive area of constitutional adjudication," *Lemon, supra,* 403 U.S. at 612, the Court has readily acknowledged that the test is not whether a religious institution derives some benefit from the government program. In upholding the constitutionality of federal aid for construction of buildings to be used for secular education at church-related colleges and universities, the Court stated:

> "* * * Construction grants surely aid these institutions in the sense that the construction of buildings will assist them to perform their various functions. But bus transportation, textbooks and tax exemptions all gave aid in the sense that religious bodies would otherwise have been forced to find other sources from which to finance these services. Yet all of these forms of governmental assistance have been upheld. [*Everson, supra, Allen, supra, Waltz, supra*] * * * The crucial question is not whether some benefit accrues to a religious institution as a consequence of the legislative program, but whether its principal or primary effect advances religion." *Tilton, supra,* 403 U.S. at 679. *See also Walz, supra,* 397 U.S. at 671-672.

In order to determine what factors distinguish permissible from prohibited aid, it is necessary to review briefly the Supreme Court decisions which have considered forms of aid to church-related schools under the primary effect test. In *Everson,* the Supreme Court upheld a state which authorized the use of tax-raised funds to reimburse parents for the costs of transporting students to and from public and private schools. The Court held that the state could extend the benefits of public welfare legislation to all citizens despite the fact that such aid helped children to get to church-related schools and that there was the possibility that some children might not have been sent to church-related schools if their parents were required to pay transportation costs. The Court found that the purpose and effect of the law was to promote general pub-

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lic welfare by helping parents get their children safely to and from accredited schools. The Court concluded that the First Amendment does not require that the state cut off sectarian schools from general services "so separate and so indisputably marked off from the religious function." *Everson, supra,* 330 U.S.C. at 18.

In *Allen,* the Supreme Court upheld a New York law which required local public school authorities to lend textbooks free of charge to all students in grades 7 through 12 including students attending private schools. The Court found no violation of the primary effect test for although the Court recognized that books can have an inherent religious significance which bus rides do not, the law provided that only secular books could be loaned and each book had to be approved by the public school authorities. The Court noted that the state has a legitimate interest in the manner in which private schools perform their secular education function. On the basis of the "meager record" in the case, the Court could not conclude that

> "* * * either all teaching in a sectarian school is religious or that the processes of secular and religious training are so intertwined that secular textbooks furnished to students by the public are in fact instrumental in the teaching of religion." 392 U.S. at 248.

Therefore, the Court upheld the law as providing a general service to all students which was consistent with the state's interest in promoting secular education in all schools.

In *Lemon,* the Court held that a Pennsylvania law which reimbursed private schools for the cost of teachers' salaries, textbooks and instructional materials in certain specified secular subjects and a Rhode Island law which supplemented the salaries of teachers of secular subjects in private elementary schools violated the Establishment Clause because the programs involved excessive government entanglement with religion. Although the Court found it un-

necessary to apply the primary effect test, the Court's analysis of the statutes in terms of this test is instructive. The Court reaffirmed its agreement in principle with the holding in *Allen* that "secular and religious education are identifiable and separable." However, the Court noted that both the Pennsylvania and Rhode Island legislatures recognized that "church-related elementary and secondary schools have a significant religious mission and that a substantial portion of their activities are religiously oriented." Therefore, in order to guarantee that state financial aid supports only secular education in these schools, the two legislatures imposed statutory restrictions on their aid programs. Although the Court did not reach the question of whether these restrictions effectively prevented the aid programs from having primary effect which violated the Establishment Clause, it is clear from the opinion that the Court agreed that given the nature of the proposed aid and the character of the school, the state was required to impose restrictions to insure that the aid benefited only secular education in order to comply with the Establishment Clause.

> "* * * The Rhode Island Legislature has not, *and could not,* provide state aid on the basis of a mere assumption that secular teachers under religious discipline can avoid conflicts. *The State must be certain, given the Religion Clauses, that subsidized teachers do not inculate religion*—indeed the State here has undertaken to do so." *Lemon, supra,* 403 U.S. at 619 (emphasis added).

Finally, in *Tilton,* the Court upheld the constitutionality of federal aid to church-related colleges and universities for construction of buildings and facilities used exclusively for secular educational purposes. In evaluating the statute in terms of its effect, the Court first reviewed the provisions of the law and found that it was carefully drafted to insure that federally subsidized buildings would be devoted to secular and not religious functions. However,

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the Court concluded that a provision of the law which permitted unrestricted use of the buildings after 20 years violated the Establishment Clause primary effect test. This decision represents the first instance in which the Court has invalidated legislation under that test.

> "* * * It cannot be assumed that a substantial structure has no value after that period and hence the unrestricted use of a valuable property is in effect a contribution of some value to a religious body. * * * If, at the end of 20 years the building is, for example, converted into a chapel or otherwise used to promote religious interests, the original federal grant will in part have the effect of advancing religion." *Tilton, supra,* 403 U.S. at 683.

The Court next examined the administration of the law and found that the restrictions on use had been complied with by the recipient institutions. Finally, on the basis of the record before it, the Court refused to conclude that religion so permeated the secular education provided by church-related colleges and universities that their religious and secular education functions were inseparable and that therefore government support of any activity of these institutions necessarily involved impermissible support of religion.[6]

These cases establish the following points of reference for any application of the primary effect test. First, absent any evidence to the contrary, the Supreme Court accepts the principle that secular and religious education in church-related schools are identifiable and separable. Second, the state has a legitimate interest in promoting the general welfare and the secular education of all school children. Third, the state may enact programs to promote the general welfare which include sectarian school students among the recipients provided the aid given has no inherent religious significance (*e.g.,* bus rides, public health serv-

[6] The Court also found that the legislation did not foster excessive government entanglement with religion.

ices), even though the aid may facilitate the operation of sectarian schools. Fourth, the state may enact programs to promote secular education in accredited schools, including church-related schools, provided the state can be certain from the nature of the aid granted or the restrictions placed upon its use that the programs will assist only secular education in church-related schools and provided further that the restrictions required to insure secular use do not give rise to excessive government entanglement with religion in the administration of the aid program. Finally, in order for a court to conclude that a statute has the constitutionally impermissible effect of advancing religion, the court is not required to conclude that the scheme of assistance will necessarily aid religion; the court can conclude that the statute has the effect of advancing religion if the terms of the statute fail to preclude a possible use of government funds to promote religious exercises.

The Act under review reimburses parents who have expended money for tuition at nonpublic schools. The legislative findings and declaration of policy underscore the legislative judgment that this type of aid will have the effect of enabling nonpublic schools, which include church-related schools, to continue to operate in Pennsylvania. The cases are clear that the state cannot directly support religious education in church-related schools although in some circumstances the state may provide sectarian schools with "secular, neutral or nonideological services, facilities, or materials." *Lemon, supra,* 403 U.S. at 616. The present Act contains no provisions to insure that state funds are restricted to such purposes. Clearly an unrestricted grant of funds by the state directly to church-related schools would constitute state support of religious instruction and worship in violation of the Establishment Clause.

> "* * * General subsidies of religious activities would, of course, constitute impermissible state involvement with religion." *Walz, supra,* 397 U.S. at 690 (Brennan, J. concurring).

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Recognizing this, defendants maintain that the Act is constitutional because the Act aids the parents and not the schools. The state enters into no direct relationship with nonpublic schools because funds are paid directly to parents who have paid tuition to nonpublic schools. Once the parents receive the funds, the state has no control over their use.[7] Furthermore, defendants argue that in *Everson* and *Allen* the Supreme Court distinguished between aid to parents and students and aid to institutions and held that state aid to parents and students does not have the primary effect of advancing religion even though sectarian schools benefit from transportation services and non-religious textbook loans.

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[7] Defendants cite *Hysong* v. *Gallitzin Borough School District*, 164 Pa. 629 (1894), for the proposition that payment of state funds is not unconstitutional because the recipients may use these funds for religious purposes. *Hysong* involved the question of whether a public school could employ Catholic nuns to teach secular subjects. One argument raised by plaintiffs was the fact that the nuns had taken a vow of poverty and turned over their salaries to their church and therefore state salary payments were being used to support religion. The Pennsylvania Supreme Court rejected this argument on the grounds that "American men and women, of sound mind and twenty-one years of age, can make such disposition of their surplus *earnings* as suits their own notions." *Hysong, supra*, 164 Pa. at 656 (emphasis added).

Hysong is clearly distinguishable from the case before us because there is no question that individuals are free to dispose of money earned by them in the course of their employment for whatever purposes they choose, including support of religion. In fact the principle of government neutrality in religious affairs is premised on the belief that religions should be supported solely by the voluntary contributions of their members. In determining whether state payments under the Act are constitutional, we must examine the criteria which qualify an individual for receipt of the funds. Certainly there can be no objection to state payments to state employees for secular teaching services in the public schools. The issue before this court is whether individuals may receive state funds solely because they have paid tuition at a church-related school.

First, we disagree with defendants' reading of *Everson* and *Allen*. The critical factor in both cases was that the subsidized school activities were nonideological or secular and therefore the public grants did not directly support religious education in the sectarian schools, although the aid did support the operation of the schools. But the fact that aid is given to parents in itself does not prevent the subsidy from having a primary effect of supporting religious instruction and worship in church-related schools. In *Allen*, the fact that the Court considered the parents and students as the beneficiaries of the aid would not have prevented the Court from striking down the law if it provided for loans of religious books to the schools. The school aid cases emphasize that the court must examine the character of the aided activity rather than the manner in which aid is given in order to determine whether the state subsidy has the primary effect of advancing religion.

Second, we conclude that the effect of the Act is to aid the schools and therefore the failure of the state to insure that the funds are restricted to secular education or general welfare services renders the Act unconstitutional.[8] Parents are eligible to receive payments under the Act because they have paid tuition at a nonpublic school. Tuitions are the "very life blood" of private educational institutions, *Almond* v. *Day*, 197 Va. 419, 427, 89 S.E.2d 851, 857 (1955), because they are the source from which many educational services, secular as well as religious, are funded. If parents cannot afford to pay the tuition, they must take their child out of the nonpublic schools and if enough parents are unable to pay these costs, the schools will be forced to close.

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[8] If the Act did include restrictions on the use of the funds, the Act would also have to avoid excessive government entanglement with religion in its administration of these restrictions. *See Lemon* and *Tilton*. The combination of the primary effect and entanglement tests clearly restricts the scope of permissible government aid to religious schools.

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It was precisely this possibility that led the Pennsylvania General Assembly to pass the Act under review. By providing parents with additional funds because they have paid tuition at nonpublic schools, the Commonwealth is trying to insure the continued ability of the parents to afford tuition costs and therefore the continued existence of nonpublic schools, including sectarian schools. The necessary effect of such a program, if it is to succeed, is that the schools will be aided by state funds. The state cannot maintain that the Act has the purpose of promoting education by supporting nonpublic schools and then deny that the effect of the Act is to aid these schools.

Defendants argue that we cannot ascertain that parents will be encouraged to send their child to church-related schools because of the state aid program. Parents may send their child to a sectarian school one year and despite the reimbursement payment decide to enroll their child in another type of school the next year. Therefore defendants argue that we cannot conclude that the Act has the necessary effect of advancing religion. However, *Tilton* established that a government aid program can be invalidated on the basis of a significant risk that the aid may serve to support religious activity at some future time. In *Tilton,* there was no evidence that the colleges receiving construction grants planned to convert the buildings into chapels or otherwise use them for religious activities after twenty years had passed. Nevertheless, the Court found the possibility of such use enough to strike down the provision of the statute which permitted unrestricted use of the buildings after twenty years. It is clear that a possible and quite likely use of the aid under review is to enable parents to continue to pay tuition at sectarian schools. Tuition payments support both religious and secular education at these schools. The mere fact that the Act does not require that parents use the funds to pay tuition at church-related schools does not relieve the state of its duty to preclude the use of its funds to support religious activities.

State courts have held that tuition grant programs in which the state channeled funds through the parents or students to the schools violate the First Amendment and state constitutional provisions.[9] *Almond* v. *Day, supra, Hartness* v. *Patterson,* 179 S.E.2d 907 (S. Carolina 1971), *Opinion of the Justices,* 259 N.E.2d 564 (Mass. 1970). Defendants argue that unlike the "conduit" plans, the Pennsylvania Act does not make payments to parents in a form that can only be used at an educational institution. Therefore, it cannot be established that the dollar used to pay tuition is the dollar the parents received from the state. However, we do not perceive any constitutional significance in the fact that payments are made in the form of reimbursement to the parents, a conduit plan or directly to the school. The economic consequences are the same for the church-related school whether it receives funds through a direct grant, a conduit plan or because the state increases family incomes through a reimbursement program which enables the parents to continue to pay tuition. In each case, tax-raised funds are being used to subsidize religious education.

Finally, even if we held that the Act does not aid sectarian schools, we must still conclude that the Act supports religion because it aids parents in providing a religious education for their children. It would seem indisputable that at least one, if not the main, purpose of a parent's

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[9] "The parent or guardian to whom the tuition fees are paid is merely the conduit or channel through whom the aid from the State to the school is transmitted." *Almond* v. *Day, supra,* 89 S.E.2d at 857.

"We reject the argument that the tuition grants provided under the Act do not constitute aid to the participating schools. Students must pay tuition fees to attend institutions of higher learning and the institutions depend upon the payment of such fees to aid in financing their operations. While it is true that the tuition grant aids the student, it is also of material aid to the institution to which it is paid." *Hartness* v. *Patterson, supra,* 179 S.E.2d at 909.

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sending his child to a religious school is to insure the early inculcation of religion. *See Walz, supra,* 397 U.S. at 671. Assuming equal secular educational standards as between public and religious schools, it is an almost inescapable corollary that the statutory reimbursement is solely to enable the parents to augment the public school secular education with religious training. If parents cannot afford to provide religious education for their children in sectarian schools without state aid, then by providing a program for aiding the parents, the state is plainly advancing religious education. The state has no more power to subsidize parents in providing a religious education for their child than it has to subsidize church-related schools to do so. *See Brusca* v. *State of Missouri ex rel. State Bd. of Ed.,* 332 F.Supp. 275 (E.D. Mo. 1971).

Having concluded that the Establishment Clause precludes state reimbursement of sums that parents have paid as tuition to schools that provide religious education, we need not consider defendants' arguments that the complaint should be dismissed for lack of standing and failure to state a claim under the Free Exercise and Equal Protection Clauses. We therefore deny defendants' motion to dismiss the complaint.

Order

AND NOW, this 6th day of April, 1972, it is ORDERED that the defendants' motion to dismiss the complaint be and it hereby is DENIED.

BY THE COURT

WILLIAM H. HASTIE
Senior Circuit Judge

JOSEPH S. LORD, III
Chief District Judge

JOHN B. HANNUM
District Judge

Order

AND NOW, this 28th day of April, 1972, upon consideration of the motions of the defendant and intervening defendants to dismiss Counts 2 and 3 of the plaintiffs' complaint, it is ORDERED that they be and hereby are GRANTED on the authority of *Lemon* v. *Kurtzman*, 310 F.Supp. 35 (E.D. Pa. 1969).

BY THE COURT

WILLIAM H. HASTIE
Senior Circuit Judge

JOSEPH S. LORD, III
Chief District Judge

JOHN B. HANNUM
District Judge

Order

AND NOW, this 20th day of June, 1972, it is ORDERED as follows:

1. It appearing that the plaintiffs seek no relief against the intervenors SETH W. WATSON, JR. and ANNE P. WATSON, his wife, the motion for summary judgment of said intervenors is DENIED without oral argument.

2. Oral argument on the plaintiffs' motion for summary judgment shall be had on Thursday, July 6, 1972, at 10:00 a.m., under the following terms and conditions:

(a) Plaintiffs shall be permitted thirty minutes for argument and the defendants shall be entitled to thirty minutes for argument to be divided among the State and intervenors as they may see fit.

(b) The parties shall direct their arguments to the following:

(i) whether the holding denying the motion to dismiss requires the entry of judgment for the plaintiffs;

(ii) whether on its face and in light of the fact that the majority of students enrolled in Pennsylvania nonpublic

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schools attend church-related schools, the Act can properly be viewed as containing a separable provision for aid to parents of children attending nonpublic schools that are not church related.

FOR THE COURT

JOSEPH S. LORD, III

Ch. J.

Order

AND NOW, this 21st day of July 1972, upon consideration of the entire record, the briefs and arguments of the parties, and of amici curiae, and it appearing that more than 90% of the children attending nonpublic schools in the Commonwealth of Pennsylvania are enrolled in schools that are controlled by religious organizations or that have the purpose of propagating and promoting religious faith, and in accordance with our Opinion dated April 6, 1972, denying the motion of the defendant to dismiss, it is ORDERED as follows:

1. The motion of the plaintiffs for summary judgment is GRANTED;

2. The defendant Grace Sloan, and her successors in office, be and they hereby are perpetually enjoined from paying any funds of the Commonwealth of Pennsylvania pursuant to Act No. 92 of August 27, 1971, known as the "Parent Reimbursement Act For Nonpublic Education" either directly or by way of reimbursement to parents of children attending nonpublic schools.

BY THE COURT:

WILLIAM H. HASTIE
Senior Circuit Judge

JOSEPH S. LORD, III
Chief District Judge

JOHN B. HANNUM
District Judge

Notice of Appeal

Notice is hereby given that Intervenor-Defendants in the above captioned matter, Jose Diaz and Enilda Diaz, his wife, William Zimmerspitz and Nancy Zimmerspitz, his wife, F. Carl Kretzmann and Kathryn L. Kretzmann, his wife, Arthur Harvey and Muriel Harvey, his wife, Daniel F. X. Powell and Anna T. Powell, his wife, and Seth W. Watson, Jr. and Anne P. Watson, his wife, appeal to the Supreme Court of the United States from the entire order entered July 21, 1972, granting Plaintiffs' Motion for Summary Judgment and perpetually enjoining the Defendant Grace Sloan from paying any funds of the Commonwealth of Pennsylvania pursuant to Act No. 92 of August 27, 1971, known as the "Parent Reimbursement Act for Nonpublic Education".

This appeal is taken pursuant to 28 U.S.C. § 1253.

Respectfully submitted,

WILLIAM BENTLEY BALL
Attorney for JOSE DIAZ, ENILDA DIAZ, SETH W. WATSON, JR. AND ANNE P. WATSON,
Intervener Defendants

JOSEPH G. SKELLY
Attorney for WILLIAM ZIMMERSPITZ, NANCY ZIMMERSPITZ, ARTHUR HARVEY AND MURIEL HARVEY,
Intervener Defendants

JAMES E. GALLAGHER, JR.
Attorney for DANIEL F. X. POWELL AND ANNA T. POWELL,
Intervener Defendants

C. CLARK HODGSON, JR.
Attorney for F. CARL KRETZMANN AND KATHRYN L. KRETZMANN,
Intervener Defendants

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Philadelphia, Pa. 19102

WILLIAM D. VALENTE
Villanova, Pa. 19085
August 7, 1972

Order

AND NOW, this 4th day of August, 1972, it is ORDERED that the motion of JOSE DIAZ and ENILDA DIAZ, his wife, WILLIAM ZIMMERSPITZ and NANCY ZIMMERSPITZ, his wife, F. CARL KRETZMANN and KATHRYN L. KRETZMANN, his wife, ARTHUR HARVEY and MURIEL HARVEY, his wife, DANIEL F. X. POWELL and ANNA T. POWELL, his wife, and SETH W. WATSON, JR. and ANNE P. WATSON, his wife, to amend the order of July 21, 1972 be and it hereby is DENIED.

FOR THE COURT

JOSEPH S. LORD, III
Ch. J.

Notice of Appeal

Notice is hereby given that Defendant in the above captioned matter, Grace Sloan, State Treasurer of the Commonwealth of Pennsylvania, appeals to the Supreme Court of the United States from the entire order entered July 21, 1972, granting Plaintiffs' Motion for Summary Judgment and perpetually enjoining the Defendant Grace Sloan from paying any funds of the Commonwealth of Pennsyl-

vania pursuant to Act No. 82 of August 27, 1971, known as the "Parent Reimbursement Act for Nonpublic Education".

This appeal is taken pursuant to 28 U.S.C. § 1253.

Respectfully submitted,

J. SHANE CREAMER
Attorney General

J. JUSTIN BLEWITT
Deputy Attorney General
Attorneys for Defendants

August 8, 1972

No. 92
AN ACT

HR 1379

Creating an authority for the purpose of avoiding increased costs of public education by providing partial reimbursement for nonpublic education and defining its powers and duties.

The General Assembly of the Commonwealth of Pennsylvania hereby enacts as follows:

Section 1. Short Title.—This act shall be known and may be cited as the "Parent Reimbursement Act for Nonpublic Education."

Section 2. Legislative Finding; Declaration of Policy.—It is hereby determined and declared as a matter of legislative finding:

(1) That parents who send their children to nonpublic schools assist the State in reducing the rising costs of public education.

(2) The welfare of the Commonwealth requires that this and future generations of school age children be assured ample opportunity to develop to the fullest their intellectual capacities. To further this objective the Common-

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wealth has had in force for many years a compulsory school attendance law.

(3) In the exercise of their constitutional right to chose nonpublic education for their children, parents who support such education make a major contribution to the public welfare. However, the immense impact of inflation, plus sharply rising costs of education, now combine to place in jeopardy the ability of such parents fully to carry this burden.

(4) Should parents of children now enrolled in nonpublic schools be forced by economic circumstances to transfer any substantial number of their children to public schools, an enormous added financial, educational and administrative burden would be placed upon the public schools and upon the taxpayers of the State. Without allowance for inflationary increase, the annual operating cost of educating in public schools, the five hundred thousand students now enrolled in Pennsylvania's nonpublic schools would be an additional four hundred million dollars ($400,000,000). Necessarily added capital costs to construct new facilities or acquire existing facilities would be in excess of one billion dollars ($1,000,000,000). Any substantial portion of these operating and capital costs would be an intolerable public burden and present standards of public education would be seriously jeopardized. Therefore, parents who maintain students in nonpublic schools provide a vital service to the Commonwealth.

Wherefore, it is declared to be the public policy of the Commonwealth:

That, in order to reimburse parents partially for this service so vitally needed by the Commonwealth, and in order to foster educational opportunity for all children, a program of Parent Reimbursement for Nonpublic Education is hereby established.

Section 3. Definitions.—The following terms, whenever used or referred to in this act, shall have the following

meanings, except in those instances where the context indicates otherwise:

(1) "Parent" means a resident of the Commonwealth of Pennsylvania who is a parent of a child enrolled in a nonpublic school or a person standing in loco parentis to such child.

(2) "Nonpublic school" means any school, other than a public school, within the Commonwealth of Pennsylvania, wherein a resident of the Commonwealth may legally fulfill the compulsory school attendance requirements of law and which meets the requirements of Title VI of the Civil Rights Act of 1964 (Public Law 88-352).

(3) "Student" means a resident of the Commonwealth of Pennsylvania who is enrolled in a nonpublic school.

(4) "Parent Reimbursement Fund" means the fund created by this act.

Section 4. Pennsylvania Assistance Authority.—There is hereby created a body corporate and politic to be known as the Pennsylvania Parent Assistance Authority, which shall consist of five members appointed by the Governor and which shall have responsibility for the administration of the program created by this act. All members shall be of full age, citizens of the United States, and residents of the Commonwealth and shall be appointed for terms of five years each. The members of the authority shall select from among themselves a chairman and a vice-chairman. The authority may employ a secretary and such other employes as it may require. Three members of the authority shall constitute a quorum for its meetings. Members shall receive no compensation for their services but shall be reimbursed for their expenses actually and necessarily incurred by them in the performance of their duties under this act. The authority shall have power to make and promulgate rules and regulations for the administration of this act: Provided, however, That it shall exercise no di-

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rection, supervision or control over the policy determinations, personnel, curriculum, program of instruction or any other aspect of the administration or operation of any nonpublic school or schools.

The authority shall have no power, at any time or in any manner to pledge the credit or taxing power of the Commonwealth, nor shall any of its obligations or debts be deemed to be obligations of the Commonwealth, and all contracts between the authority and parents or other persons in loco parentis shall be satisfied solely from funds provided under this act.

Section 5. Parent Reimbursement Fund.—There is hereby created for the special purpose of this act, a Parent Reimbursement Fund. Beginning July 1, 1971, twenty-three per cent of the tax revenue collected by the Department of Revenue, pursuant to the act of July 22, 1970 (P.L. 513), known as the "Pennsylvania Cigarette Tax Act," shall be paid into the State Treasury to the credit of the Parent Reimbursement Fund.

Moneys in the Parent Reimbursement Fund are hereby appropriated to the Pennsylvania Parent Assistance Authority, to be used solely for the purposes of this act.

All expenses incurred in connection with the administration of this act shall be paid solely out of the Parent Reimbursement Fund.

Section 6. Eligibility.—In order to be eligible for tuition reimbusement hereunder, the parent of a student shall, at the completion of the school year but not later than July fifteenth, file with the Parent Assistance Authority a verified statement that the student has completed the school year in a nonpublic school or schools and, in addition, the following information: (i) the name and address of the parent; (ii) the name, address and birth date of the student; (iii) the name and address of the nonpublic school or schools in which the student completed the school year

and (iv) a receipted tuition bill or copy of the executed contract under which the student attended the nonpublic school or schools.

Section 7. Tuition Reimbursement Payments to Parents. —Upon the filing by a parent of the verified statement as required by section 6, the Parent Assistance Authority shall make a tuition reimbursement payment to such parent in the amount of (i) seventy-five dollars ($75) for each elementary school student to whom the parent bears a parental relationship and one hundred fifty dollars ($150) for each secondary student to whom the parent bears a parental relationship, or (ii) the actual amount of tuition paid or contracted to be paid by a parent, whichever is lesser.

Reimbursement payments to parents hereunder shall be made not later than September fifteenth in the school year following the school year for which tuition reimbursement payments are being made.

Section 8. Penalties.—The Parent Assistance Authority shall have power to employ means reasonably necessary to determine the accuracy of all statements submitted by parents in connection with reimbursement payments hereunder. Any person who, by means of a willfully false statement, secures or attempts to secure or aids or abets any person in securing reimbursement payment hereunder, shall be guilty of a misdemeanor, and, upon conviction thereof, shall be sentenced to pay a fine of not exceeding one thousand dollars ($1,000), or to undergo imprisonment not exceeding one year, or both, and shall also be sentenced to make restitution of any moneys he has received by reason of any false statement.

Section 9. Insufficient Moneys in Fund.—In the event that, in any fiscal year, the total amount of moneys which were actually paid into the Parent Reimbursement Fund shall be insufficient to pay the total number of claims submitted by parents to the Parent Assistance Authority, the

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reimbursement payments provided for in section 7 shall be proportionate in amount to the per cent which the total amount of moneys in the Parent Reimbursement Fund bears to the total amount of claims.

Section 10. Severability.—If a part of this act is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of this act is invalid, in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications.

Section 11. Effective Date.—This act shall take effect immediately.

APPROVED—The 27th day of August, A. D. 1971.

MILTON J. SHAPP

The foregoing is a true and correct copy of Act of the General Assembly No. 92.

C. DELORES TUCKER
Secretary of the Commonwealth.

October Term, 1972

No. 72-620

HENRY A. GROUTER,

Appellant,

v.

ALTON J. LESSON, NEAL P. BRACKEN, and BENJAMIN S. LOWENSTEIN,

Appellees.

On Appeal From the United States District Court for the Eastern District of Pennsylvania

JURISDICTIONAL STATEMENT OF APPELLANT HENRY A. GROUTER

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JURISDICTIONAL STATEMENT.

Appellant, Henry E. Crouter, a parent of a child enrolled in a nonpublic school and intervenor defendant below, who is being assisted in this appeal by the Pennsylvania Association of Independent Schools (See footnote 2 below), by its counsel Henry T. Reath and Duane, Morris & Heckscher appeals from the final Order of the three-judge District Court entered on July 21, 1972. This Order perpetually enjoined Grace Sloan, State Treasurer of the Commonwealth of Pennsylvania and her successors in office from paying out any funds of the Commonwealth of Pennsylvania pursuant to Act No. 92 of August 27, 1971, known as the Parent Reimbursement Act for Nonpublic Education for reimbursement to parents of children attending nonpublic schools who have paid tuition for education that meets the State's requirement for compulsory education.

Appellant Crouter submits this statement (and joins in the Jurisdictional Statement submitted on behalf of appellants Sloan, Diaz et al.) to show that this Court has jurisdiction of the appeal; that the questions presented have never been ruled on by this Court, and are substantial,—so substantial, in fact, that the very future of this country's historic commitment to pluralism in education and its desire to avoid the staggering financial burden to the taxpayers should nonpublic education fail, will be determined by the decision in this case.

OPINION BELOW.

On April 6, 1972, the District Court rendered its opinion denying the motions to dismiss filed by defendant Crouter and the other appellants (defendants below). After all Answers were filed, the District Court by Order of July 21, 1972, granted plaintiff's Motion for Summary Judgment on the Opinion of April 6, 1972. The Opinion is reported in 346 F. Supp. 1356 (1972) and is in the Appendix at page 1a.

JURISDICTION.

This action, to enjoin enforcement of a Pennsylvania Statute as unconstitutional was brought under 28 U. S. C. §§ 1331, 1343(3), 2201 and 2202 and was heard by a three-judge court pursuant to 28 U. S. C. § 2284. The final decree of the three-judge court was entered on July 21, 1972; Notice of Appeal was filed in the District Court by Appellant Crouter on August 21, 1972.

The jurisdiction of the United States Supreme Court to review this decision by direct appeal is conferred by Title 28 U. S. C. § 1253. That jurisdiction is sustained by the decision of this Court in *Briggs v. Elliott*, 342 U. S. 350 (1952) and *Lemon v. Kurtzman*, 403 U. S. 602 (1971).

STATUTE INVOLVED.

The statute involved is the Pennsylvania Parent Reimbursement Act for Nonpublic Education, Act 92 of the Laws of Pennsylvania, 1971, P. L. — (the "Act"), the full text of which is in the Appendix at pages 23a-28a.

The Act authorizes reimbursement of tuition payments to parents of any child enrolled in a nonpublic school that meets the requirements of Pennsylvania's compulsory school attendance law and the provisions of Title VI of the Civil Rights Act of 1964 (i.e. prohibiting discrimination because of "race, color or national origin."). The Act authorizes payments of up to $75.00 for elementary school children and up to $150.00 for secondary school children or the actual tuition amount paid whichever amount is lesser.

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QUESTIONS PRESENTED.

The questions presented are:

1. Where a state statute authorizes reimbursement for a portion of nonpublic school tuition to be paid, not to the school, but to parents, who alone have the choice whether to send their children to a secular or religious school, can it be said as a matter of law that the primary effect of such legislation is to advance religion in violation of the Establishment Clause of the First Amendment of the U. S. Constitution?

2. Where the principal requirement for parents' eligibility under the Act is that the school meet the state's requirements for compulsory education, and the amount of parent reimbursement is significantly less than the cost per pupil of public education, can it be said as a matter of law that the primary effect of such ~~litigation~~ legislation is to advance religion?

3. Did not the Court below, having found that the Act had a proper secular purpose—(i.e. to aid education and not to advance religion)—err in holding the Act unconstitutional where plaintiffs failed to offer any evidence to support a finding that the Act had a different primary effect,—to advance religion?

4. Where a state seeks to partially reimburse parents for tuition expense actually incurred at nonpublic schools, does the fact that the Act fails to require that funds disbursed to parents be restricted to secular education or general welfare services, violate the Establishment Clause?

5. Where state aid for nonpublic education is to the parent and not to an institution, does not this overcome any problems of entanglement between church and state?

STATEMENT.

On August 27, 1971, the Act became law. It created the Parent Assistance Authority to administer the fund established, but with the provisions that the Authority

> "exercise no direction, supervision or control over the policy determination, personnel, curriculum, program of instruction or any other aspect of the administration or operation of any nonpublic operation of any nonpublic school or schools. (Section 4, p. 26a.)

The Parent Reimbursement Fund (Section 5, p. 26a) does not depend on annual appropriations, but rather is funded by a set percentage of the revenue collected under Pennsylvania's Cigarette Tax Act.

To be eligible for tuition reimbursement (up to $75.00 for elementary school students and up to $150.00 for secondary students), each parent at the completion of the school year must file with the Parent Assistance Authority a verified statement that the student has completed the school year in a nonpublic school and that he has paid, or become legally obligated to pay tuition in excess of that claimed for reimbursement.

The legislature's statement of purpose, which was found by the Lower Court to be a valid secular purpose, declared inter-alia, that in light of the valuable contribution made by nonpublic education to the public welfare, it was in the public interest to use public funds to partially assist parents in defraying the cost actually expended by them for nonpublic education.[1]

---

1. The full declaration of purpose states:

(1) That parents who send their children to nonpublic schools assist the State in reducing the rising costs of public education.

(2) The welfare of the Commonwealth requires that this and future generations of school age children be assured ample opportunity to develop to the fullest their intellectual capacities. To further this objective the Commonwealth has had in force for many years a compulsory school attendance law.

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On September 13, 1971, the Appellees (plaintiffs below) brought this action naming as defendant the State Treasurer and contended that the Act violated the Establishment, Free Exercise, and Equal Protection clauses of the constitution. Thereafter, plaintiffs sought an injunction against paying out any funds.

On December 21, 1971, Henry E. Crouter, parent of a child in a nonpublic school whose counsel in this case also represents the Pennsylvania Association of Independent Schools ("PAIS"),[2] filed a motion pursuant to Rule 24(a)

---

1. (Cont'd.)

(3) In the exercise of their constitutional right to choose nonpublic education for their children, parents who support such education make a major contribution to the public welfare. However, the immense impact of inflation, plus sharply rising costs of education, now combine to place in jeopardy the ability of such parents fully to carry this burden.

(4) Should parents of children now enrolled in nonpublic schools be forced by economic circumstances to transfer any substantial number of their children to public schools, an enormous added financial, educational and administrative burden would be placed upon the public schools and upon the taxpayers of the State. Without allowance for inflationary increase, the annual operating cost of educating in public schools, the five hundred thousand students now enrolled in Pennsylvania's nonpublic schools would be an additional four hundred million dollars ($400,000,000). Necessarily added capital costs to construct new facilities or acquire existing facilities would be in excess of one billion dollars ($1,000,000,000). Any substantial portion of these operating and capital costs would be an intolerable public burden and present standards of public education would be seriously jeopardized. Therefore, parents who maintain students in nonpublic schools provide a vital service to the Commonwealth.

Wherefore, it is declared to be the public policy of the Commonwealth:

That, in order to reimburse parents partially for this service so vitally needed by the Commonwealth, and in order to foster educational opportunity for all children, a program of Parent Reimbursement for Nonpublic Education is hereby established. Section 2, pp. 23a-24a.

2. The Pennsylvania Association of Independent Schools is a non-profit corporation organized and existing under the laws of Pennsylvania as an association concerned with the interests of its

to intervene as a party defendant, and an order granting his motion to intervene was entered December 27, 1971.

Subsequently 12 other parents of children enrolled in nonpublic schools in Pennsylvania were permitted to intervene.

All Defendants, including Crouter, moved to dismiss plaintiff's complaint, inter alia on the grounds that plaintiff's complaint which alleged that the Act on its face violated the Establishment Clause, failed to state a claim upon which relief can be granted.

On April 6, 1972, the three-judge District Court denied these motions. The Court in its opinion, contending that it was bound by this Court's decision in *Lemon v. Kurtzman*, 403 U. S. 602 (1971), held that:

> ¶ The Act expressed a proper secular purpose i.e. to aid education and not advance religion;
>
> ¶ The fact that aid is given to parents and not to schools does not prevent the payments from having a primary effect of supporting religious instruction and

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2. (Cont'd.)

member schools in elementary and secondary education in this Commonwealth.

Its membership consists of 94 elementary and secondary schools, both private and church related, located throughout the Commonwealth, and for all practical purposes it represents almost all of the independent schools in this state.

All PAIS member schools admit all qualified students without regard to race, color, creed, or national origin.

All elementary and secondary member schools of the Association are accredited either by the Pennsylvania Association of Private Academic Schools or by the Middle States Association of Colleges and Secondary Schools and as such qualify to furnish education to Pennsylvania students under the provisions of the Pennsylvania Compulsory School Attendance Law.

PAIS was a party in interest in *Lemon v. Kurtzman*, 403 U. S. 602 (1971).

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worship in church related schools. The effect of the Act is to aid these schools;

¶ Failure of the state to insure that the funds are restricted to secular education or general welfare services renders the Act unconstitutional;

¶ The Act, insofar as it may aid any parents to provide a religious education for their children, supports religion and violates the Establishment Clause.

On April 28, 1972, the three-judge court granted the appellants' motion to dismiss those counts of the complaint relating to the free exercise and equal protection clauses. Thereafter all defendants filed answers, and appellee and intervenor defendants Seth W. Watson and Anne P. Watson filed motions for summary judgment, which were denied by order of June 20, 1972.

Thereafter, on July 21, 1972, and based on the Opinion of April 6, 1972, the three-judge court ordered that plaintiffs' motion for summary judgment be granted and that defendant and her successors in office be perpetually enjoined from paying any funds under Act No. 92.

THE QUESTIONS ARE SUBSTANTIAL.

1. Introduction.

The questions raised by this appeal are substantial in that:

1. The form of aid provided by the Pennsylvania Act now under attack (i.e., to parents for reimbursement of tuition already paid—rather than by payments directly to the institutions involved) has never been reviewed by this Court.

2. Unless this Court now makes clear that the rules laid down in *Lemon v. Kurtzman* and *Tilton v. Richardson* apply only to grants made directly to religious institutions or religious orders, and *not* to a payment or tax credit[3] to parents, then:

(a) the will of the people of Pennsylvania, as expressed through their elected representatives in the legislature will have been thwarted with serious economic consequences to nonpublic as well as public education in Pennsylvania; and

(b) it will for all practical purposes, be impossible for the states or the federal government to make any significant financial commitment to

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3. It has been contended by some commentators that a federal tax credit would pass constitutional muster. In reality, this is no different than parent reimbursement. In both cases, the net financial effect to the parent who pays taxes is exactly the same—i.e., either cash in hand or cash credit against taxes owed. Furthermore, there is no difference, insofar as entanglement between church and state is concerned,—because in neither situation is any effort made by or required of the granting authority to check on the scope of religious activities. A tax credit or a payment to parents is self-policing.

In one important respect, however, parent reimbursement poses fewer constitutional problems. Since tax credits are of no value to low income families who pay no tax, it has been argued by those opposing tax credits that a tax credit constitutes discrimination against the poor—and violates the equal protection clause of the Fourteenth Amendment.

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nonpublic education that will preserve our system of pluralism and the healthy competition that exists among our various forms of secondary schools,—public, private and religious. Should this come to pass, state and local governments will be faced with a financial crisis they cannot meet [4] and we will have lost a priceless historical heritage and asset, which, once destroyed, can never again be recovered. See President Nixon's Message to the Congress of March 3, 1970, a portion of which is reproduced below.[5]

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4. See footnote 1, Legislative Declaration of Purpose No. 4 and footnote 5 below.

5. No clearer or more eloquent concise statement can be found posing the serious national crisis which confronts us than the following passage from the Message of President Nixon on Education Reform to the Congress of the United States, March 3, 1970, where he stated:

"(f) Non-Public Schools.—The non-public elementary and secondary schools in the United States have long been an integral part of the nation's educational establishment—supplementing in an important way the main task of our public school system. The nonpublic schools provide a diversity which our educational system would otherwise lack. They also give a spur of competition to the public schools—through which educational innovations come, both systems benefit, and progress results."

"Should any single school system—public or private—ever acquire a complete monopoly over the education of our children, the absence of competition would neither be good for that school system nor good for the country. The nonpublic schools also give parents the opportunity to send their children to a school of their own choice, and of their own religious denomination. They offer a wide range of possibilities for education experimentation and special opportunities for minorities, especially Spanish-speaking Americans and black Americans."

"Up to now, we have failed to consider the consequences of declining enrollments in private elementary and secondary schools, most of them church supported, which educate 11% of all pupils—close to six million school children. In the past two years, close to a thousand nonpublic elementary and secondary schools closed and most of their displaced students enrolled in local public schools."

The Pennsylvania Parent Reimbursement Act establishes a program which has never before been ruled on by an opinion of this Court—i.e., a program whereby parents of children attending nonpublic schools meeting the state's standards for compulsory education, are eligible for partial reimbursement, only after they have paid or become legally obligated to pay tuition to a school of the parents' own choosing.

In some respects it is similar to the federal legislation authorizing the expenditure of federal funds for the education of pages serving in the Congress and the U. S. Supreme Court.[6] That act, which has been in effect and unchallenged for over 25 years, expressly provides that pages may choose to attend private or parochial schools of their free choice and that payments shall be made directly[7] to such schools, but at a rate no greater than that provided for in the public schools.

Also, under the GI Bill, thousands of veterans have used government funds at all kinds of schools, both religious and otherwise, even including attending divinity schools. 72 Stat. 1177 (1958), 28 U. S. C. Section 1620.

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5. (Cont'd.)

"If most or all private schools were to close or turn public, the added burden on public funds by the end of the 1970's would exceed $4 billion per year in operations, with an estimated $5 billion more needed for facilities."

"There is another equally important consideration: these schools—non-sectarian, Catholic, Protestant, Jewish and other —often add a dimension of spiritual value giving children a moral code by which to live. This government cannot be indifferent to the potential collapse of such schools."

6. August 2, 1946, C. 753, Title II Section 243, 60 Stat. 839 2 U. S. C. Section 888a(b).

7. In this regard, the provisions of the Parent Reimbursement Act pose even fewer constitutional problems—since as noted in Section 5 below, there are significant constitutional differences between payment to parents and payment to the school or religious order itself.

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2. This Court's Decision of October 10th in the Ohio Case of Wolman v. Essex Does Not Control This Case.

We cannot believe that it was the intention of this Court, by refusing to hear the Ohio case (*Wolman v. Essex*, 342 F. Supp. 399 (S. D. Ohio 1972), *Essex v. Wolman*, U. S. Supreme Court, No. 71-1664) to rule, without consideration of briefs, let alone full argument before the Court, that *any* form of tuition aid to parents for nonpublic education expense actually incurred, is per se unlawful and violates the Establishment Clause of the First Amendment of the Constitution. Yet that is precisely the way the Court's decision has been interpreted by the media, commentators, the general public and opposing counsel in this case.[8] Of necessity this would in fact be the result, if this Court were to now refuse to hear the defendants' appeals in the instant case.

There are both substantive and procedural issues that distinguish this case from the Ohio case. There are at least two basic Constitution issues raised by defendants' appeals in this case that were not raised by defendants in the Ohio case—and thus not considered or ruled upon by this Court.

Furthermore, such an important national issue should not be so summarily disposed of. As of this writing, there are ten states, whose duly elected Legislators representing in excess of 88 million persons, have enacted, or have under consideration enactment of, some form of tuition aid to parents and have allocated conservatively in excess of $150 million dollars as their commitment to preserving pluralism in education.[9]

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8. See Motion to Dismiss or Affirm filed by counsel for plaintiffs in response to Jurisdictional Statement filed by counsel for Jose Diaz et al. at pp. 2 and 3.

9. Seven states have enacted laws providing for some form of tuition aid to parents of nonpublic school children: Connecticut, Maryland, Ohio, Pennsylvania, Illinois, New York and Minnesota.

If the Court were to now refuse to hear the instant appeal, the result would be not only a harsh denial of due process of law to the people of Pennsylvania and the millons of people in other states who have such a vital stake in such laws; but also there would be widespread public misunderstanding as to how such an important national issue could be decided in such fashion.

The Ohio court's decision in *Wolman v. Essex*, 342 F. Supp. 399 (S. D. Ohio 1972) does not, and should not, decide the issues presented by this case.

(a) The Ohio Court's opinion was based upon a full and thorough review of an extensive factual record much of which was irrelevant on constitutional grounds but from which it could have been argued that its effect was different from its stated purpose—i.e. that its effect was to favor a particular religious denomination. On the contrary, *no evidence concerning any factual issues has been submitted in this case.* Moreover, as noted by intervenor defendant Crouter's motion to strike, and motion to alter or amend judgment (See Appendix, p. 20a), any inquiry concerning a parent's use of the reimbursement, his religious views, or the religious practices at schools attended by his children violates his freedom of conscience and religion, and invades his privacy. (See discussion below at 5(c).)

(b) The court in *Wolman* held that even though the class which the statute benefited is small and sectarian, that was not grounds for holding it *per se* unconstitutional; the Ohio statute failed because of entanglement since each year the Ohio general assembly had to appropriate funds for parent reimbursement. Significantly, although the entanglement issue was argued to

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9. (Cont'd.)

Similar legislation has been proposed in Louisiana, West Virginia, and California. National Catholic Educational Association; *State Aid to Nonpublic Schools,* (1972).

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the Court below; it did not—and could not—find that the Pennsylvania Act posed a danger of undue entanglement between government and religion. The Act does not depend for funding upon annual action by the Pennsylvania legislature since its funding does not require annual appropriations. Compare *United States v. Butler*, 297 U. S. 1 (1936) with *Mulford v. Smith*, 307 U. S. 38 (1939) and *Wickard v. Filburn*, 317 U. S. 111 (1942).

(c) The Jurisdictional Statement filed by appellants Sloan and intervenors Diaz, et al. raises an additional constitutional issue not raised or considered in the Ohio case—i.e., that excluding from benefits of the Act parents who choose a religious education for their child, violates the parents' equal protection rights.

(d) Finally, by the time *Essex v. Wolman* reached this Court, the issue was moot for Ohio residents since the Ohio legislature enacted a tax credit program for parents of nonpublic school children, and the constitutionality of that enactment is presently being challenged in *Kosydar v. Wolman* (Civil action 72-212, D. C. S. D. Ohio, Eastern Division). The present appeal, however, presents a crucial determination for the people of Pennsylvania, since more than $51 million dollars has been accumulated in the fund from the cigarette tax, which but for these proceedings could now be paid out for the school year 1971-72.

3. This Court Should Now Review the Action of the Lower Court Which, Without Any Factual Record, Made the Unjustified Finding as a Matter of Law That Any Form of Tuition Aid to Parents Constitutes Advancement of Religion.

This Court should now take jurisdiction and hear defendants' appeals to right an egregious wrong to the people

of Pennsylvania,—and to make clear the limits within which state action may be used to aid all nonpublic education, which, though it may have an incidental effect of giving indirect aid to religious schools, does not constitute state "advancement of religion."

At the outset, the problem should be put in proper focus. Proponents of state aid for nonpublic education do not have the burden of showing it is constitutional. To the contrary, that burden rests with those who seek the exercise of the extraordinary power of the federal courts to declare state action unconstitutional. And it is a very heavy burden. This Court has stated many times that it will only act in clear cases, where plaintiffs have met their burden of proof by relevant and constitutionally admissible evidence. This is not one of them.

As developed below, the record of this case is totally devoid of *any* evidence that the effect of the Pennsylvania Act so deviates from its avowed and proper purpose as to declare it unconstitutional.

The clear purpose and undeniable effect of this legislation was and is to aid all forms of nonpublic education—i.e. both private and religious schools by easing the financial burden of the parents who must pay the bills and to safeguard the public treasury against the staggering drain that would occur if these schools were to collapse.

To say that under a parent reimbursement bill the parent acts as a mere conduit to the school not only is a premise without any factual foundation in the record but denies and undermines the very basis upon which our Constitution and Bill of Rights is founded—i.e., personal liberty, a belief in private institutions and the right of each individual to make his own free choice. Where the parent is the recipient of state aid, he stands as the wall of separation between church and state, and enables the state to meet

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its legitimate aims, assistance to secular education, and at the same time preserve its proper role of neutrality by neither advancing nor inhibiting religion.

While it is true that religious schools of the Catholic faith predominate in the field of nonpublic education, there are a host of private schools, as well as schools controlled by or related to other religious faiths such as Friends (Quaker), Lutheran, Presbyterian, Episcopalian, Methodist, Jewish, and other denominational church related schools which enthusiastically support the Pennsylvania Act and whose parents would benefit from its provisions. That is precisely why the Pennsylvania Association of Independent Schools has authorized its counsel to assist defendant Crouter in pressing this appeal, and why the National Association of Independent Schools is filing an amicus brief in this case.

We readily concede, and could not in good conscience argue to this Court otherwise, that one of the effects of parent reimbursement is to indirectly benefit the entire nonpublic system of education in Pennsylvania, including parochial and other religious schools. But as Mr. Chief Justice Burger in *Tilton v. Richardson*, 403 U. S. 672 (1971), and this Court in earlier cases [10] have so clearly pointed out, there is a critical difference between state action which may *benefit* religion or religious institutions, and state action which sponsors or constitutes the *advancement of religion*. Only the latter violates the Establishment Clause, which we submit, if your Honors decide to hear this case, should now be reexamined in light of its true historical purpose—i.e. to prevent the formation of any government "established

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10. *Everson v. Board of Education*, 330 U. S. 1, 17 (1947); *Zorach v. Clauson*, 343 U. S. 306, 314 (1952); *Board of Education v. Allen*, 392 U. S. 236, 244 (1968).

church", whether it was an established Church from Rome, England, or from any other religious denomination.[11]

It certainly was not the purpose of our founding fathers to outlaw religion or to turn us into an agnostic state. As Mr. Chief Justice Burger has so eloquently pointed out in *Walz v. Tax Commission,* 397 U. S. 664 (1970), the role of government in this area should be one "of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference".

We believe and urge upon this Court that upon a careful examination of the record, it will be determined that:

¶ Plaintiffs have failed utterly to establish by competent admissible evidence that the effect of this Act advances religion or involves state action in sponsorship of religion; and

¶ Because of the constitutional restraints discussed below, and the inherent differences between payment to a parent and payment to a religious school,

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11. In this connection, see the following opinion by Judge Palmieri in *Committee for Public Education and Religious Liberty v. Levitt,* Civil Action No. 70-3251 (S. D. N. Y. filed April 27, 1972), where, in refusing to join in an order invalidating state action giving aid to nonpublic schools for auxiliary administrative services, he stated as follows:

> "To suggest otherwise is to let prejudice against education under religious auspices prevail over wise analysis. It is a tragic symptom of our time that so simple an objective of a state legislature, simply implemented, should become a focus of objection by those who appear to share deep antipathies and fears with regard to secular education under religious auspices. One is impelled to ask whether the eyes of these who have such fears may be blinded by tragic conflicts now lost in history and which anteceded that of our own Constitution.
>
> I am constrained to decline to particpate in destroying this legislative act by judicial action." . . .

The full text of Judge Palmieri's opinion is cited in the brief of Appellee, PAIS, etc. in *Lemon v. Kurtzman,* second appeal, October Term, No. 71-1470 at pages 31-34.

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plaintiffs cannot prevail in their effort to thwart the legitimate aims of the people of Pennsylvania to support nonpublic education and to avoid the catastrophic financial impact they would suffer [12] if nonpublic education were to fail because of the serious financial crisis facing it.[13]

4. The Lower Court Misinterpreted and Misapplied the Rules Laid Down by This Court in *Lemon v. Kurtzman*.

This Court, in the Opinion of Mr. Chief Justice Burger in *Lemon v. Kurtzman*, 403 U. S. 602 (1971) summarized the 3-fold test for measuring whether public aid to nonpublic education violates the Establishment Clause:

> "¶ First, the statute must have a secular legislative purpose;
>
> ¶ Second, its principal or primary effect must be one that neither advances or inhibits religion; *Board of Education v. Allen*, 392 U. S. 236, 243 (1968);
>
> ¶ Finally, the statute must not foster "an excessive government entanglement with religion." 403 U. S. at 612-613. (paragraphs supplied for clarity)

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12. See in particular footnote (5) above from President Nixon's Report on Education Reform to the effect that if all private schools were to close or turn public, the added burden on public funds up to the end of the 1970's would "exceed $4 billion per year in operations, with an estimated $5 billion more needed for facilities."

To the same effect, see Legislative Declaration of Purpose No. 4 taken from footnote 1 at page 4 with respect to the financial impact such closing would have on Pennsylvania.

13. For further documentation of the financial crisis facing parochial education in the Philadelphia area, see Report of the Gurash Committee—"Report of the Archdiocesan Advisory Committee on the Financial Crisis of Catholic Schools in Philadelphia and Surrounding Counties", an abridged copy of which has been annexed to and made a part of the brief for Appellee Pennsylvania Association of Independent Schools in the matter of *Lemon v. Kurtzman*, Appeal No. 2, U. S. Supreme Court, October Term 1972, No. 71-1470.

It will be remembered that in *Lemon v. Kurtzman* (the Pennsylvania Act authorized direct payment to religious or secular schools for purchase of secular educational services) this Court:

¶ found a proper secular legislative purpose;

¶ declined to rule on whether the Act had a primary effect that advanced religion but inferentially concluded that it did not and let stand the Lower Court's ruling that it did not (see 403 U. S. at 613-614); but

¶ ruled that the controls imposed on the institutions receiving funds, to insure the funds would not be used for religious purposes, constituted undue entanglement between church and state so as to void any payments to religious schools.

There is nothing in the Court's decision in *Lemon v. Kurtzman* that controls or bars reimbursement to parents under the Act here considered. To the contrary, this Court has on frequent occasions pointed out that in Establishment Clause cases the facts in each case must be carefully analyzed. Some of the general principles applicable are:

1. There is no precise and absolute test; "we can only dimly perceive the boundaries of permissible government activity in this sensitive area . . ." *Tilton v. Richardson*, 403 U. S. 672, 678-679 (1971);

2. The role of government is to be neutral—it must neither advance nor inhibit religion. *Board of Education v. Allen*, 392 U. S. 236, 242-43 (1968); its role is that of "benevolent neutrality." *Tilton, supra* at 669;

3. The test is not whether a religious institution may be benefited, but whether the principal effect of the Act is to advance religion. *Tilton, supra* at 679;

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4. The American public places a high value on the importance of nonpublic education.[14]

The foregoing principles are best summarized in Mr. Chief Justice Burger's Opinion in *Walz v. Tax Commission*, 397 U. S. 664 (1970) at 669:

> The course of constitutional neutrality in this area cannot be an absolutely straight line; rigidity could well defeat the basic purpose of these provisions, which is to insure that no religion be sponsored or favored, none commanded, and none inhibited. The general principle deducible from the First Amendment and all that has been said by the Court is this: *that we will not tolerate either governmentally established religion or governmental interference with religion.* Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference. (Emphasis added.)

5. The Lower Court Erred in Concluding That Payment to Parents Was a Distinction Without a Difference. Payment to the Parents Makes All the Difference.

(a) Parent Becomes a Wall of Separation Between Church and State.

The lower Court held that payments to parents, rather than to the schools, was a distinction without a difference.

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14. ". . . private education has played and is playing a significant and valuable role in raising national levels of knowledge, competence, and experience. Americans care about the quality of the secular education available to their children. They have considered high quality education to be an indispensable ingredient for achieving the kind of nation, and the kind of citizenry, that they have desired to create.

Considering this attitude, the continued willingness to rely on private school systems, including parochial systems, strongly sug-

We believe that this distinction makes all the difference.

When funds are paid to the parents, this represents the classic case where the government is preserving its traditional role of "benevolent neutrality", of neither advancing nor inhibiting religion. The parents become the wall of absolute separation between church and state. They and they alone make the choice [15] between public, secular, private or religious school. Since neither the state nor the school can control the funds, neither has any leverage nor any points of friction or contact between the other.

Furthermore, it can hardly be said, as did the Court below, that the parent serves as a mere conduit— where as in this case, reimbursement is only made after tuition has been paid. When the parent receives the money, it is his and his alone to spend—on the races, put in the bank or whatever he chooses to do.

(b) The Reimbursement Does Not Advance Religion Since the Amount Paid Is Less Than the Cost Per Pupil of Public Education.

Where, as in this case, the amount of reimbursement is substantially less than the per pupil cost of public education,[16] how can it be contended, even if the conduit theory

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14. (Cont'd.)
gests that a wide segment of informed opinion, legislative and otherwise, has found that those schools do an acceptable job of providing secular education to their students." (*Board of Education v. Allen*, 392 U. S. 236 at 247-248).

15. The parent's absolute freedom of choice is very real. It means that no school, religious or otherwise can indefinitely count on getting the funds appropriated to the parents since the parent always possesses the absolute right to withdraw his child, and send him to another school or pass up the payments entirely and send his child to public school.

16. The total general fund expenses compiled from the annual financial reports of Pennsylvania school districts show a total cost per public school pupil in the school year 1969-70 of $943.22. Statistical Report of the Secretary of Education for the school year ending 1970.

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was accepted, that public funds are used to advance religion—since under the Act, any school to qualify for parent reimbursement must meet the state's same high standards for compulsory education as do the public schools?

(c) It Is Irrelevant and Beyond the Scope of Constitutional Inquiry to Require Parents to Divulge Whether Their Child Attends a Religious School.

Finally, on purely constitutional grounds, there is a basic and fundamental legal difference between payments to parents and payment to, for example, a religious school or order. Where payment is made to the parent, that must be the end of any further inquiry of what happens thereafter to the money. For it seems patently clear that the very same First Amendment, which opponents of the Act so zealously profess to protect, likewise forbids inquiry of the parents by the state, or the courts, regarding the presence or absence of religious practices at the school to which they elect to send their child.[17]

Thus, for good and valid constitutional grounds, where payments are made to individual parents, it is beyond the scope of permissible inquiry to even attempt to establish as a legal proposition that public funds are used for or diverted by the parents to religious purposes. For the same reason, it would be beyond the right of welfare officials to

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17. Any such inquiry would violate the parents' free exercise rights and their traditional freedom of choice and conscience in matters of educating their children and of religion, as well as their right of privacy. *Pierce v. Society of Sisters*, 268 U. S. 510 (1925); *Baird v. State Bar of Arizona*, 401 U. S. 1 (1971); *Law Students Civil Rights Research Council, Inc. v. Wadmond*, 299 F. Supp. 117, 129 (S. D. N. Y. 1969) affirmed 401 U. S. 154 (1971); *Shelton v. Tucker*, 364 U. S. 479, 488 (1960); *Griswold v. Connecticut*, 381 U. S. 479 (1965).

The Court below recognized this problem but failed to come to grips with it. See discussion below, p. 23, especially footnote 19.

probe into the religious practices of a charity to whom an individual on welfare elected to make a contribution out of money given him and intended for food.

Under these circumstances, the Lower Court clearly erred in resting its entire decision on the premise that the Act supports religion, particularly where the record was devoid of any evidence that public funds were in fact used by parents to secure religious education.

The Court held the Act unconstitutional on two grounds:

> 1. "The mere fact that the Act does not require that parents use the funds to pay tuition at church-related schools does not relieve the state of its duty to preclude the use of its funds to support religious activities," citing as its authority *Tilton, supra* (See opinion at Appendix 14a).
>
> 2. The unsupported finding in its order of July 21st that "more than 90% of the children attending nonpublic schools in the Commonwealth of Pennsylvania are enrolled in schools that are controlled by religious organizations or that have the purpose of propagating and promoting religious faith." (See Appendix p. 18a).

The Court's reliance on *Tilton* for proposition number one above is totally unjustified. That requirement in *Tilton* applied to a direct grant of funds to a religious institution for physical facilities,—and was mandated by this Court to insure that at no time in the future would the facilities be used for religious purposes. It has no application whatsoever to the case at bar.

The Court's reliance on the statement that 90% of the children attending nonpublic schools attend schools con-

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trolled by religious organizations is likewise the weakest kind of bootstrap jurisprudence. Putting aside whether the statement is factually correct [18] the fact remains that the lower court assumed a premise which may be essentially correct, but which, because of the interposition of the parents and their constitutionally protected status cannot be established as a legal proposition or the basis of a constitutional attack.

Thus, the Court below, in order to justify a decision they had already reached, completely disregarded the crucial constitutional issue discussed above,—which it recognized as a serious problem in footnote 5 of its opinion of April 6, 1972 but which it declined to rule on at the pleading stage as premature.[19] Two months later (see

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18. There is no evidence in the pleadings or record to support the accuracy of this statement.

19. Footnote 5 of the Court's opinion reads as follows:

> [5] Defendant intervener Crouter has moved under F. R. Civ. P. 12(f) to strike paragraph 10 of plaintiff's complaint as immaterial and as requiring inquiry into the religious practices and character of schools to which parents choose to send their children in violation of the parents' rights of free exercise of religion, privacy, and freedom of expression.
>
> F. R. Civ. P. 12(f) provides that "the court may order stricken from any pleading, any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Defendant maintains that the allegations of paragraph 10 concerning the religious character of nonpublic schools are constitutionally irrelevant because the Act does not give aid to schools, but to parents. However, the issue of whether the Act aids religious schools or aids parents to provide a religious education for their children is one of the issues in dispute in this litigation, and the allegations of paragraph 10 are certainly relevant to the plaintiffs' claims.
>
> ". . . The motion to strike should be granted only when the pleading to be stricken has no possible relation to the controversey." *Brown and Williamson Tobacco Corp. v. U. S.*, 201 F. 2d 819, 822 (C. A. 6, 1953). *See also Augustus v. Bd. of Public Instruction*, 306 F. 2d 862, 868

Order of July 21, 1972, Appendix, p. 18a) the Court decided this critically important constitutional question without any discussion or citation of cases but by blandly assuming as a proved fact that which was denied, put at issue in the pleadings and vigorously objected to on constitutional grounds. (See in particular Defendant Crouter's Motion to Amend Judgment filed on August 3, 1972 and reprinted at Appendix, pp. 20a-21a).

6. The Proper Test Under the Establishment Clause Is Not Whether the Act Benefits Schools, Religious or Secular, But Whether It Advances Religion.

The ultimate issue is whether the Act has the primary effect of advancing religion. State action can benefit religion or religious institutions without advancing religion. By authorizing payments directly to eligible parents, the Legislature has structured the Act to avoid entanglement and to prevent it from having any involvement in, let alone advancement of, religion.

As noted previously, in *Lemon v. Kurtzman*, 403 U. S. 602, despite the vigorous arguments of appellants, this Court refused to rule that the principal or primary effect of the statute was one which advanced religion. It thus left undisturbed the finding of the lower court that the primary effect of the Act did not do so.

In *Tilton v. Richardson*, Mr. Chief Justice Burger reaffirmed this Court's extreme reluctance to assume that the

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19. (Cont'd.)

(C. A. 5, 1962), 2A J. Moore, *Federal Practice* § 12.21[2] (2d ed. 1968).

Defendant's further objection concerning the constitutionality of inquiring into the religious character of the schools *is premature and should be raised once such information is actually sought.* We therefore deny defendant intervener's motion to strike paragraph 10. (emphasis added).

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proper purposes of a carefully drafted Act will be subverted in the actual administration of the Act:

> "A possibility always exists, of course, that the legitimate objectives of any law or legislative program may be subverted by conscious design or lax enforcement. There is nothing new in this argument. But judicial concern about these possibilities cannot, standing alone, warrant striking down a statute as unconstitutional." 403 U. S. at 679.

Nevertheless, even though the Act does not fix eligibility along religious lines, nor in any way restrict the parents' use of the reimbursement payments, the Court below held the Act invalid on the ground that parents can possibly spend the money at church-related schools since the State does not preclude use of its funds to support religious activities.

The Court below then erroneously concluded that the Act's primary effect is to advance religion and as noted above, made this finding as a matter of law without any factual record to support its ruling that the effect differed materially from the primary purpose of state aid to education. In reaching such a conclusion, the Court has misconstrued the true meaning of the term "advancement of religion."

This Court has, on many occasions, taken great pains to distinguish between programs that advance religion contrary to the First Amendment and acts that may indirectly benefit religious institutions as permitted by the Amendment. In so doing it has upheld

> ¶ the right of Catholic schools to fulfill compulsory educational requirements *Pierce v. Society of Sisters,* 268 U. S. 510 (1925)

¶ transportation reimbursement payments to parents (*Everson v. Board of Education*, 330 U. S. 1 (1947))

¶ released time for religious instruction from public school (*Zorach v. Clauson*, 343 U. S. 306 (1952))

¶ textbook loans to nonpublic school children (*Board of Education v. Allen*, 392 U. S. 236 (1968))

¶ construction grants to sectarian institutions of higher learning (*Tilton v. Richardson, supra*, 1971)

In the non-educational area, there are many decisions affirming the constitutional propriety of state action that clearly benefits religious institutions without advancing religion:

¶ Grants to religious orders for hospitals (*Bradfield v. Roberts*, 175 U. S. 291 (1899))

¶ Sunday closing laws (*McGowan v. Maryland*, 366 U. S. 420 (1961))

¶ Tax exemption from property taxes *Walz v. Tax Commission of the City of New York*, 397 U. S. 664 (1970)

The test, as stressed by Mr. Chief Justice Burger in the Court's Opinion in *Tilton, is not whether there is a incidental benefit to religion—but whether the primary effect of state action is to advance religion.* See *Tilton, supra* at 679.

Advancement of *religion* results only when the state *actively* and *directly* promotes religion, such as by the establishment of a state church or by insisting on Bible reading or compulsory prayers. Thus, over the years, the Supreme Court has invalidated education laws on the grounds of primary religious effect in only three cases:

¶ *Abington v. Schempp*, 374 U. S. 203 (1963) (compulsory school prayers)

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¶ *Engle v. Vitale,* 370 U. S. 421 (1962) (compulsory school prayers)

¶ *Illinois ex rel. McCollum v. Board of Education,* 333 U. S. 203 (1948) (religious instruction in public schools).

The practices struck down all involved religious exercises in *public* schools and were also programs whose *purpose* was *to advance* religion. By contrast, in the five cases upholding state benefits to nonpublic institutions, individuals were exposed to the benefited institutions only by their own free choice. See *Tilton v. Richardson, supra; Walz v. Tax Commission, supra; Board of Education v. Allen, supra; Everson v. Board of Education, supra; Quick Bear v. Leupp,* 210 U. S. 50 (1908).

7. State Aid for Nonpublic Education to the Parent and Not to an Institution Overcomes Any Problems of Entanglement Between Church and State.

The Court below, and we submit properly, rejected plaintiff's contentions that the Act was unconstitutional because of entanglement problems.

The entanglement problems were overcome, first, by removal from the parent reimbursement act of the "restrictions and surveillance" which had been written into the Pennsylvania Act 109 for purchase of service contracts for secular education and which caused this Act to be stricken down in *Lemon v. Kurtzman* (see *Lemon v. Kurtzman, supra* at 620-621).

Secondly, there are in the present Act no payments to any religious schools or institutions, thereby removing the situation "pregnant with involvement" to which this Court in its opinion in *Walz* addressed itself. In *Walz,* the issue was the extent to which a benefit could be conferred directly on a religious institution. In that situation, the Court

pointed out the grave entanglement problems that would result from a direct money subsidy to such a religious institution.[20]

Clearly, when the benefit is conferred on the parent, either by tax credit or by reimbursement—which both have the same effect in terms of net dollars to the parent (see footnote 3 above), the problem of administrative entanglement does not exist, since there are no strings attached to the benefit other than that the recipient certify that he has spent X dollars on tuition at a nonpublic school.

Furthermore, with respect to the problem of political entanglement, that doctrine would not apply where, as here, the recipient is an individual person—a citizen of the United States, clothed as he is with the Constitutional protection and guarantee of his rights of free speech, freedom of assembly, freedom of petition, et cetera.

Finally, as pointed out at pp. 12-13, *supra,* there do not exist in the Pennsylvania Act the entanglement problems which prompted the lower court to strike down the Ohio statute. The Pennsylvania Act is self-executing in that the funds are automatically allocated from the cigarette tax, and do not require the kind of annual general appropriations as were present in the Ohio case.

CONCLUSION.

Historically, private elementary and secondary education has made a significant contribution to and played a

20. See *Walz, supra* 397 U. S. at 675:

Obviously a direct money subsidy would be a relationship pregnant with involvement and, as with most governmental grant programs, would encompass sustained and detailed administrative relationships for enforcement of statutory or administrative standards, but that is not this case. The hazards of churches supporting government are hardly less in their potential than the hazards of government supporting churches; each relationship carries some involvement rather than the desired insulation and operation. (footnote omitted).

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unique role in this country. It must be preserved if we are to retain the pluralism and spirit of democracy to which our Constitution and judicial system are dedicated. However, the continued viability and vitality of private education is imperiled by the severe economic crisis facing it.

Fortunately, our people are at long last moving towards solutions, as their elected representatives in the Congress and state legislatures throughout the land genuinely experiment to find ways that public monies can be used to further nonpublic education and still preserve the neutrality of government by neither advancing nor inhibiting religion in the process.

The cases are legion in church-state relations where the judicial branch of Government has been called on as the arbitrator, in the delicate balancing of conflicting interests. While there always will be a wide diversity of views, the fact remains that a majority of the Justices of the Supreme Court in decisions from *Bradfield v. Roberts,* 175 U. S. 291 (1899) to *Lemon v. Kurtzman,* 403 U. S. 602 (1971) have recognized certain basic principles of constitutional law that lead inexorably to the conclusion that the will of the people of Pennsylvania should not be thwarted by declaring the present Act unconstitutional. These principles are:

¶ Public aid to private education serves a proper public purpose.[21]

¶ It is possible to separate religion from sectarian education. A majority of the Justices have rejected[22]

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21. *Everson v. Board of Education, supra* at 7; *Board of Education v. Allen,* 392 U. S. 236, 247-248 (1968).

22. See Opinion of Mr. Chief Justice Burger, in *Lemon v. Kurtzman,* 403 U. S. at 613 where he stated:

"The legislatures of Rhodes Island and Pennsylvania have concluded that secular and religious education are identifiable and separable. In the abstract we have no quarrel with this conclusion."

And also Court's Opinion in *Tilton,* 403 U. S. at 679-680.

the absolutist view that religion and secular education are so intertwined, with each permeating the other, that any form of aid to education that in any way benefits religion must be totally barred by the First Amendment.

¶ It is both possible—and constitutionally permissible to distribute public funds or use state action in such a way that religion and religious institutions may indirectly benefit—and yet preserve government neutrality.[23] This is particularly so where funds are paid not to the institution, but to those who directly benefit and can control their use.

Finally, we recognize and are sensitive to the awesome and difficult responsibility which would face this Court in deciding the questions raised by this appeal that so vitally affect the national interest—i.e. whether pluralism or a monolithic structure of public education is to prevail. We believe that the former is more in keeping with the free democratic traditions of this country—but in truth, this is a question of educational philosophy to be resolved by the people in open debate through their elected representatives and not a legal issue which this Court must resolve.

Mindful of the frequent admonition that a Court's power to declare state action unconstitutional should be sparingly exercised, only in compelling circumstances, and then only with great care,[24] we urge this Court to hear the defendants' appeals so that any doubts as to the constitutionality of the Pennsylvania Act may be resolved in favor of its validity. This is particularly so in view of the strong public interest, as evidenced by extensive state action in

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23. See Discussion *supra* pages 23-25.

24. *Walters v. City of St. Louis*, 347 U. S. 231 (1954); *New York v. O'Neill*, 359 U. S. 1 (1959).

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this area[25] to preserve and improve the high quality of private education.

We ask this Court to hear defendants' appeals so that it may, after full consideration of briefs and oral argument, determine whether the Pennsylvania Parent Reimbursement Act:

¶ does have as its primary effect the advancement of religion?

¶ represents a lawful and valid expression of all the people of this Commonwealth of their genuine desire to (1) ease the financial burden of those parents who must pay the lion's share of the cost and (2) thereby avoid the resulting financial crisis to the public treasury should all nonpublic education fail?

¶ does not by reimbursing parents—rather than making payments to the schools or to religious orders that operate them—eliminate the objectionable entanglement feature that was held fatal to the Pennsylvania purchase of secular services plan in *Lemon v. Kurtzman*?

Respectfully submitted,

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25. See text *supra* p. 11 and footnote 9.

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APPENDIX.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

CIVIL ACTION NO. 71-2223.

ALTON J. LEMON, NEAL F. BRACKEN AND BENJAMIN S. LOEWENSTEIN

v.

GRACE SLOAN, STATE TREASURER OF THE COMMONWEALTH OF PENNSYLVANIA

JOSE DIAZ AND ENILDA DIAZ, HIS WIFE; WILLIAM ZIMMERSPITZ AND NANCY ZIMMERSPITZ, HIS WIFE; F. CARL KRETZMANN AND KATHERYN L. KRETZMANN, HIS WIFE; ARTHUR HARVEY AND MURIEL HARVEY, HIS WIFE; DANIEL F. X. POWELL AND ANNA T. POWELL, HIS WIFE; AND SETH W. WATSON, JR., AND ANNE P. WATSON, HIS WIFE; AND HENRY R. CROUTER,

Interveners.

BEFORE: WILLIAM H. HASTE, Senior Circuit Judge JOSEPH S. LORD, III, Chief District Judge JOHN B. HANNUM, District Judge.

Opinion.

April 6, 1972

By JOSEPH S. LORD, III, *Chief District Judge*

Plaintiffs brought this suit to declare the Pennsylvania Parent Reimbursement Act for Nonpublic Education [1] (the

1. Act 92 of the Pennsylvania General Assembly, August 27, 1971. Appendix A, *infra*.

"Act") unconstitutional and to enjoin its operation. The Act is challenged as violative of the Establishment and Free Exercise Clauses of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment. This court has jurisdiction of the controversy pursuant to 28 U. S. C. §§ 1331, 1343(3), 2281 and 2284. Presently before the court are motions of defendant and intervening defendants to dismiss the complaint for lack of standing and failure to state a claim upon which relief can be granted.

The plaintiffs are citizens, residents and taxpayers of the Commonwealth of Pennsylvania who have paid the Pennsylvania cigarette tax which finances the Act. Plaintiff Lemon is also the parent of a Negro child attending a public school in Pennsylvania. Defendant Sloan is State Treasurer of the Commonwealth of Pennsylvania and is sued in that capacity. Intervening defendants are citizens, residents and taxpayers of the Commonwealth of Pennsylvania. Interveners are parents of one or more students who are enrolled in nonpublic schools in Pennsylvania and interveners are eligible for tuition reimbursement payments under the Act.

The Act provides for the reimbursement of tuition payments to parents whose children have completed the school year in a nonpublic school located in Pennsylvania which fulfills the compulsory school attendance requirements under Pennsylvania law and the requirements of Title VI of the Civil Rights Act of 1964.[2] In its legislative findings and declaration of policy, the Pennsylvania General Assembly determined that parents who send their children to nonpublic schools assist the state in reducing the rising cost of public education. The General Assembly found that if inflation and rising costs of education force parents of

2. Title VI prohibits discrimination on the ground of race, color, or national original in programs receiving federal financial assistance. 42 U. S. C. § 2000d *et seq.*

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children now enrolled in nonpublic schools to transfer a substantial number of their children to public schools, "an enormous added financial, educational and administrative burden would be placed upon the public schools and upon the taxpayers of the state.[3] Therefore, in order to insure that parents can continue to aid the state by sending their children to nonpublic schools and in order to foster-educational opportunity for all children, the General Assembly established the tuition reimbursement program.

The first ground of defendants' motion to dismiss is that the complaint fails to state a claim under the Establishment Clause of the First Amendment upon which relief can be granted.[4] Plaintiffs allege that the Act authorizes payment for the tuition of students in educational institutions which

> "* * * (1) are controlled by churches or religious organizations, (2) have as their purpose the teaching, propagation and promotion of a particular religious faith, (3) conduct their operations, cirriculums [sic] and programs to fulfill that purpose, (4) impose religious restrictions on admissions, (5) require attendance at instruction in theology and religious doctrine, (6) require attendance at or participation in religious worship, (7) are an integral part of the religious mission of the sponsoring church, (8) have as a substantial or dominant purpose the inculation of religious values, (9) impose religious restrictions on faculty appointments, or (10) impose religious restrictions on what the faculty may teach." ¶ 10 Complaint.[5]

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3. Section 2(4), Act 92, Appendix A.

4. Defendants concede and we find that plaintiffs have standing to sue under the Establishment Clause. *Flast v. Cohen*, 392 U. S. 83 (1968).

5. Defendant intervener Crouter has moved under F. R. Civ. P. 12(f) to strike paragraph 10 of plaintiff's complaint as immaterial and as requiring inquiry into the religious practices and character

For the purpose of considering the motion to dismiss, we must accept these allegations as true. Therefore, the issue before us is whether the Establishment Clause prohibits the state from reimbursing parents for the tuition costs of sending their children to church-related elementary and secondary schools.

The Establishment Clause was intended to protect against "sponsorship, financial support, and active involvement of the sovereign in religious activity." *Walz v. Tax Commission,* 397 U. S. 664, 668 (1970). *See also* Everson v. Board of Education, 330 U. S. 1 (1947), *Engel v. Vitale,* 370 U. S. 421 (1962).

> "Every analysis must begin with the candid acknowledgment that there is no single constitutional caliper whch can be used to measure the precise degree to which these three factors are present or absent. Instead, our analysis in this area must begin with a

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of schools to which parents choose to send their children in violation of the parents' rights of free exercise of religion, privacy, and freedom of expression.

F. R. Civ. P. 12(f) provides that "the court may order stricken from any pleading, any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Defendant maintains that the allegations of paragraph 10 concerning the religious character of nonpublic schools are constitutionally irrelevant because the Act does not give aid to schools, but to parents. However, the issue of whether the Act aids religious schools or aids parents to provide a religious education for their children is one of the issues in dispute in this litigation, and the allegations of paragraph 10 are certainly relevant to the plaintiffs' claims.

> "* * * The motion to strike should be granted only when the pleading to be stricken has no possible relation to the controversey." *Brown and Williamson Tobacco Corp. v. U. S.,* 201 F. 2d 819, 822 (C. A. 6, 1953). *See also Augustus v. Bd. of Public Instruction,* 306 F. 2d 862, 868 (C. A. 5, 1962), 2A J. Moore, *Federal Practice* § 12.21[2] (2d ed. 1968).

Defendant's further objection concerning the constitutionality of inquiring into the religious character of the schools is premature and should be raised once such information is actually sought. We therefore deny defendant intervener's motion to strike paragraph 10.

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consideration of the cumulative criteria developed over many years and applying to a wide range of governmental action challenged as violative of the Establishment Clause."

Tilton v. Richardson, 403 U. S. 672, 677-678; 29 L. Ed. 2d 790, 798 (1971).

In *Lemon v. Kurtzman*, 403 U. S. 602, 612-613; 29 L. Ed. 2d 745, 755 (1971), the Supreme Court restated the three tests it has developed for determining whether a particular program offends the Establishment Clause.

"* * * First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor prohibits religion, *Board of Education v. Allen*, 392 U. S. 236, 243, 20 L. Ed. 2d 1060, 1065, 88 S. Ct. 1923 (1968); finally, the statute must not foster 'an excessive government entanglement with religion.' *Walz, supra*, at 674, 25 L. Ed. 2d at 704."

The stated legislative purpose of the Act is to aid parents to continue to send their children to nonpublic schools thereby fostering educational opportunities for both public and nonpublic school children. The legislative findings and declaration of policy indicate that the General Assembly is concerned with maintaining the present standards of public education which it finds would be seriously jeopardized if parents of nonpublic school children could no longer afford tuition costs and were forced to send their children to public schools. "A State always has a legitimate concern for maintaining minimum standards in all schools it allows to operate." *Lemon, supra*, 403 U. S. at 613. Therefore, according the stated legislative intent appropriate deference, we conclude that the Act expresses a legitimate

secular objective consistent with the Establishment Clause. *See Allen, supra,* 392 U. S. 243; *Lemon, supra,* 403 U. S. at 613, *Tilton, supra,* 403 U. S. at 678-679,

We must next determine whether the Act has the primary effect of advancing religion. The very existence of this "test" reflects the Court's determination that there may be some forms of aid to church-related activities which do not involve that sponsorship, financial support or the active involvement of the state in religious activity which the Establishment Clause was intended to prevent. Although the Court "can only dimly perceive the boundaries of permissible government activity in this sensitive area of constitutional adjudication," *Lemon, supra,* 403 U. S. at 612, the Court has readily acknowledged that the test is not whether a religious institution derives some benefit from the government program. In upholding the constitutionality of federal aid for construction of buildings to be used for secular education at church-related colleges and universities, the Court stated:

> "* * * Construction grants surely aid these institutions in the sense that the construction of buildings will assist them to perform their various functions. But bus transportation, textbooks and tax exemptions all gave aid in the sense that religious bodies would otherwise have been forced to find other sources from which to finance these services. Yet all of these forms of governmental assistance have been upheld. [*Everson, supra, Allen, supra, Waltz, supra*] * * * The crucial question is not whether some benefit accrues to a religious institution as a consequence of the legislative program, but whether its principal or primary effect advances religion." *Tilton, supra,* 403 U. S. at 679. *See also Walz, supra,* 397 U. S. at 671-672.

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In order to determine what factors distinguish permissible from prohibited aid, it is necessary to review briefly the Supreme Court decisions which have considered forms of aid to church-related schools under the primary effect test. In *Everson*, the Supreme Court upheld a state which authorized the use of tax-raised funds to reimburse parents for the costs of transporting students to and from public and private schools. The Court held that the state could extend the benefits of public welfare legislation to all citizens despite the fact that such aid helped children to get to church-related schools and that there was the possibility that some children might not have been sent to church-related schools if their parents were required to pay transportation costs. The Court found that the purpose and effect of the law was to promote general public welfare by helping parents get their children safely to and from accredited schools. The Court concluded that the First Amendment does not require that the state cut off sectarian schools from general services "so separate and so indisputably marked off from the religious function." *Everson, supra*, 330 U. S. C. at 18.

In *Allen*, the Supreme Court upheld a New York law which required local public school authorities to lend textbooks free of charge to all students in grades 7 through 12 including students attending private schools. The Court found no violation of the primary effect test for although the Court recognized that books can have an inherent religious significance which bus rides do not, the law provided that only secular books could be loaned and each book had to be approved by the public school authorities. The Court noted that the state has a legitimate interest in the manner in which private schools perform their secular education function. On the basis of the "meager record" in the case, the Court could not conclude that

> "* * * either all teachings in a sectarian school is religious or that the processes of secular and religious training are so intertwined that secular textbooks furnished to students by the public are in fact instrumental in the teaching of religion." 392 U. S. at 248.

Therefore, the Court upheld the law as providing a general service to all students which was consistent with the state's interest in promoting secular education in all schools.

In *Lemon*, the Court held that a Pennsylvania law which reimbursed private schools for the cost of teachers' salaries, textbooks and instructional materials in certain specified secular subjects and a Rhode Island law which supplemented the salaries of teachers of secular subjects in private elementary schools violated the Establishment Clause because the programs involved excessive government entanglement with religion. Although the Court found it unnecessary to apply the primary effect test, the Court's analysis of the statutes in terms of this test is instructive. The Court reaffirmed its agreement in principle with the holding in *Allen* that "secular and religious education are identifiable and separable." However, the Court noted that both the Pennsylvania and Rhode Island legislatures recognized that "church-related elementary and secondary schools have a significant religious mission and that a substantial portion of their activities are religiously oriented." Therefore, in order to guarantee that state financial aid supports only secular education in these schools, the two legislatures imposed statutory restrictions on their aid programs. Although the Court did not reach the question of whether these restrictions effectively prevented the aid programs from having primary effect which violated the Establishment Clause, it is clear from the opinion that the Court agreed that given the nature of the proposed aid and the character of the school, the state

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was required to impose restrictions to insure that the aid benefited only secular education in order to comply with the Establishment Clause.

> "* * * The Rhode Island Legislature has not, *and could not,* provide state aid on the basis of a mere assumption that secular teachers under religious discipline can avoid conflicts. *The State must be certain, given the Religion Clauses, that subsidized teachers do not inculate religion*—indeed the State here has undertaken to do so." *Lemon, supra,* 403 U. S. at 619 (emphasis added).

Finally, in *Tilton,* the Court upheld the constitutionality of federal aid to church-related colleges and universities for construction of buildings and facilities used exclusively for secular educational purposes. In evaluating the statute in terms of its effect, the Court first reviewed the provisions of the law and found that it was carefully drafted to insure that federally subsidized buildings would be devoted to secular and not religious functions. However, the Court concluded that a provision of the law which permitted unrestricted use of the buildings after 20 years violated the Establishment Clause primary effect test. This decision represents the first instance in which the Court has invalidated legislation under that test.

> "* * * It cannot be assumed that a substantial structure has no value after that period and hence the unrestricted use of a valuable property is in effect a contribution of some value to a religious body. * * * If, at the end of 20 years the building is, for example, converted into a chapel or otherwise used to promote religious interests, the original federal grant will in part have the effect of advancing religion." *Tilton, supra,* 403 U. S. at 683.

The Court next examined the administration of the law and found that the restrictions on use had been complied with by the recipient institutions. Finally, on the basis of the record before it, the Court refused to conclude that religion so permeated the secular education provided by church-related colleges and universities that their religious and secular education functions were inseparable and that therefore government support of any activity of these institutions necessarily involved impermissible support of religion.[6]

These cases establish the following points of reference for any application of the primary effect test. First, absent any evidence to the contrary, the Supreme Court accepts the principle that secular and religious education in church-related schools are identifiable and separable. Second, the state has a legitimate interest in promoting the general welfare and the secular education of all school children. Third, the state may enact programs to promote the general welfare which include sectarian school students among the recipients provided the aid given has no inherent religious significance (*e.g.*, bus rides, public health services), even though the aid may facilitate the operation of sectarian schols. Fourth, the state may enact programs to promote secular education in accredited schools, including church-related schools, provided the state can be certain from the nature of the aid granted or the restrictions placed upon its use that the programs will assist only secular education in church-related schools and provided further that the restrictions required to insure secular use do not give rise to excessive government entanglement with religion in the administration of the aid program. Finally, in order for a court to conclude that a statute has the constitutionally impermissible effect of advancing religion, the

6. The Court also found that the legislation did not foster excessive government entanglement with religion.

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court is not required to conclude that the scheme of assistance will necessarily aid religion; the court can conclude that the statute has the effect of advancing religion if the terms of the statute fail to preclude a possible use of government funds to promote religious exercises.

The Act under review reimburses parents who have expended money for tuition at nonpublic schools. The legislative findings and declaration of policy underscore the legislative judgment that this type of aid will have the effect of enabling nonpublic schools, which include church-related schools, to continue to operate in Pennsylvania. The cases are clear that the state cannot directly support religious education in church-related schools although in some circumstances the state may provide sectarian schools with "secular, neutral or nonideological services, facilities, or materials." *Lemon, supra,* 403 U. S. at 616. The present Act contains no provisions to insure that state funds are restricted to such purposes. Clearly an unrestricted grant of funds by the state directly to church-related schools would constitute state support of religious instruction and worship in violation of the Establishment Clause.

> "* * * General subsidies of religious activities would, of course, constitute impermissible state involvement with religion." *Walz, supra,* 397 U. S. at 690 (Brennan, J. concurring).

Recognizing this, defendants maintain that the Act is constitutional because the Act aids the parents and not the schools. The state enters into no direct relationship with nonpublic schools because funds are paid directly to parents who have paid tuition to nonpublic schools. Once the parents receive the funds, the state has no control over their use.[7] Furthermore, defendants

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7. Defendants cite *Hysong v. Gallitzin Borough School District,* 164 Pa. 629 (1894), for the proposition that payment of state funds

argue that in *Everson* and *Allen* the Supreme Court distinguished between aid to parents and students and aid to institutions and held that state aid to parents and students does not have the primary effect of advancing religion even though sectarian schools benefit from transportation services and non-religious textbook loans.

First, we disagree with defendants' reading of *Everson* and *Allen*. The critical factor in both cases was that the subsidized school activities were nonideological or secular and therefore the public grants did not directly support religious education in the sectarian schools, although the aid did support the operation of the schools. But the fact that aid is given to parents in itself does not prevent the subsidy from having a primary effect of supporting religious instruction and worship in church-related schools. In *Allen*, the fact that the Court considered the parents and students

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is not unconstitutional because the recipients may use these funds for religious purposes. *Hysong* involved the question of whether a public school could employ Catholic nuns to teach secular subjects. One argument raised by plaintiffs was the fact that the nuns had taken a vow of poverty and turned over their salaries to their church and therefore state salary payments were being used to support religion. The Pennsylvania Supreme Court rejected this argument on the grounds that "American men and women, of sound mind and twenty-one years of age, can make such disposition of their surplus *earnings* as suits their own notions." *Hysong, supra,* 164 Pa. at 656 (emphasis added).

Hysong is clearly distinguishable from the case before us because there is no question that individuals are free to dispose of money earned by them in the course of their employment for whatever purposes they choose, including support of religion. In fact the principle of government neutrality in religious affairs is premised on the belief that religions should be supported solely by the voluntary contributions of their members. In determining whether state payments under the Act are constitutional, we must examine the criteria which qualify an individual for receipt of the funds. Certainly there can be no objection to state payments to state employees for secular teaching services in the public schools. The issue before this court is whether individuals may receive state funds solely because they have paid tuition at a church-related school.

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as the beneficiaries of the aid would not have prevented the Court from striking down the law if it provided for loans of religious books to the schools. The school aid cases emphasize that the court must examine the character of the aided activity rather than the manner in which aid is given in order to determine whether the state subsidy has the primary effect of advancing religion.

Second, we conclude that the effect of the Act is to aid the schools and therefore the failure of the state to insure that the funds are restricted to secular education or general welfare services renders the Act unconstitutional.[8] Parents are eligible to receive payments under the Act because they have paid tuition at a nonpublic school. Tuitions are the "very life blood" of private educational institutions, *Almond v. Day*, 197 Va. 419, 427, 89 S. E. 2d 851, 857 (1955), because they are the source from which many educational services, secular as well as religious, are funded. If parents cannot afford to pay the tuition, they must take their child out of the nonpublic schools and if enough parents are unable to pay these costs, the schools will be forced to close. It was precisely this possibility that led the Pennsylvania General Assembly to pass the Act under review. By providing parents with additional funds because they have paid tuition at nonpublic schools, the Commonwealth is trying to insure the continued ability of the parents to afford tuition costs and therefore the continued existence of nonpublic schools, including sectarian schools. The necessary effect of such a program, if it is to succeed, is that the schools will be aided by state funds. The state cannot main-

8. If the Act did include restrictions on the use of the funds, the Act would also have to avoid excessive government entanglement with religion in its administration of these restrictions. *See Lemon* and *Tilton*. The combination of the primary effect and entanglement tests clearly restricts the scope of permissible government aid to religious schools.

tain that the Act has the purpose of promoting education by supporting nonpublic schools and then deny that the effect of the Act is to aid these schools.

Defendants argue that we cannot ascertain that parents will be encouraged to send their child to church-related schools because of the state aid program. Parents may send their child to a sectarian school one year and despite the reimbursement payment decide to enroll their child in another type of school the next year. Therefore defendants argue that we cannot conclude that the Act has the necessary effect of advancing religion. However, *Tilton* established that a government aid program can be invalidated on the basis of a significant risk that the aid may serve to support religious activity at some future time. In *Tilton*, there was no evidence that the colleges receiving construction grants planned to convert the buildings into chapels or otherwise use them for religious activities after twenty years had passed. Nevertheless, the Court found the possibility of such use enough to strike down the provision of the statute which permitted unrestricted use of the buildings after twenty years. It is clear that a possible and quite likely use of the aid under review is to enable parents to continue to pay tuition at sectarian schools. Tuition payments support both religious and secular education at these schools. The mere fact that the Act does not require that parents use the funds to pay tuition at church-related schools does not relieve the state of its duty to preclude the use of its funds to support religious activities.

State courts have held that tuition grant programs in which the state channeled funds through the parents or students to the schools violate the First Amendment and state constitutional provisions.[9] *Almond v. Day, supra,*

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9. "The parent or guardian to whom the tuition fees are paid is merely the conduit or channel through whom the aid from the State

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Hartness v. Patterson, 179 S. E. 2d 907 (S. Carolina 1971), *Opinion of the Justices*, 259 N. E. 2d 564 (Mass. 1970). Defendants argue that unlike the "conduit" plans, the Pennsylvania Act does not make payments to parents in a form that can only be used at an educational institution. Therefore, it cannot be established that the dollar used to pay tuition is the dollar the parents received from the state. However, we do not perceive any constitutional significance in the fact that payments are made in the form of reimbursement to the parents, a conduit plan or directly to the school. The economic consequences are the same for the church-related school whether it receives funds through a direct grant, a conduit plan or because the state increases family incomes through a reimbursement program which enables the parents to continue to pay tuition. In each case, tax-raised funds are being used to subsidize religious education.

Finally, even if we held that the Act does not aid sectarian schools, we must still conclude that the Act supports religion because it aids parents in providing a religious education for their children. It would seem indisputable that at least one, if not the main, purpose of a parent's sending his child to a religious school is to insure the early inculcation of religion. *See Walz, supra*, 397 U. S. at 671. Assuming equal secular educational standards as between public and religious schools, it is an almost inescapable sequitur that the statutory reimbursement is solely to en-

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to the school is transmitted." *Almond v. Day, supra*, 89 S. E. 2d at 857.

"We reject the argument that the tuition grants provided under the Act do not constitute aid to the participating schools. Students must pay tuition fees to attend institutions of higher learning and the institutions depend upon the payment of such fees to aid in financing their operations. While it is true that the tuition grant aids the student, it is also of material aid to the institution to which it is paid." *Hartness v. Patterson, supra*, 179 S. E. 2d at 909.

able the parents to augment the public school secular education with religious training. If parents cannot afford to provide religious education for their children in sectarian schools without state aid, then by providing a program for aiding the parents, the state is plainly advancing religious education. The state has no more power to subsidize parents in providing a religious education for their child than it has to subsidize church-related schools to do so. *See Brusca v. State of Missouri ex rel. State Bd. of Ed.*, 332 F. Supp. 275 (E. D. Mo. 1971).

Having concluded that the Establishment Clause precludes state reimbursement of sums that parents have paid as tuition to schools that provide religious education, we need not consider defendants' arguments that the complaint should be dismissed for lack of standing and failure to state a claim under the Free Exercise and Equal Protection Clauses. We therefore deny defendants' motion to dismiss the complaint.

Order.

AND NOW, this 6th day of April, 1972, it is ORDERED that the defendants' motion to dismiss the complaint be and it hereby is DENIED.

BY THE COURT

WILLIAM H. HASTIE
Senior Circuit Judge

JOSEPH S. LORD, III
Chief District Judge

JOHN B. HANNUM
District Judge

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Order.

AND NOW, this 28th day of April, 1972, upon consideration of the motions of the defendant and intervening defendants to dismiss Counts 2 and 3 of the plaintiffs' complaint, it is ORDERED that they be and hereby are GRANTED on the authority of *Lemon v. Kurtzman*, 310 F. Supp. 35 (E. D. Pa. 1969).

BY THE COURT

WILLIAM H. HASTIE
Senior Circuit Judge

JOSEPH S. LORD, III
Chief District Judge

JOHN B. HANNUM
District Judge

Order.

AND NOW, this 20th day of June, 1972, it is ORDERED as follows:

1. It appearing that the plaintiffs seek no relief against the intervenors SETH W. WATSON, JR. and ANNE P. WATSON, his wife, the motion for summary judgment of said intervenors is DENIED without oral argument.

2. Oral argument on the plaintiffs' motion for summary judgment shall be had on Thursday, July 6, 1972, at 10:00 a.m., under the following terms and conditions:

(a) Plaintiffs shall be permitted thirty minutes for argument and the defendants shall be entitled to thirty minutes for argument to be divided among the State and intervenors as they may see fit.

(b) The parties shall direct their arguments to the following:

(i) whether the holding denying the motion to dismiss requires the entry of judgment for the plaintiffs;

(ii) whether on its face and in light of the fact that the majority of students enrolled in Pennsylvania nonpublic schools attend church-related schools, the Act can properly be viewed as containing a separable provision for aid to parents of children attending nonpublic schools that are not church related.

FOR THE COURT

JOSEPH S. LORD, III
Ch. J.

Order.

AND NOW, this 21st day of July 1972, upon consideration of the entire record, the briefs and arguments of the parties, and of amici curiae, and it appearing that more than 90% of the children atetnding nonpublic schools in the Commonwealth of Pennsylvania are enrolled in schools that are controlled by religious organizations or that have the purpose of propagating and promoting religious faith, and in accordance with our Opinion dated April 6, 1972,

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denying the motion of the defendant to dismiss, it is ORDERED as follows:

1. The motion of the plaintiffs for summary judgment is GRANTED;

2. The defendant Grace Sloan, and her successors in office, be and they hereby are perpetually enjoined from paying any funds of the Commonwealth of Pennsylvania pursuant to Act No. 92 of August 27, 1971, known as the "Parent Reimbursement Act For Nonpublic Education" either directly or by way of reimbursement to parents of children attending nonpublic schools.

BY THE COURT

WILLIAM H. HASTIE
Senior Circuit Judge

JOSEPH S. LORD, III
Chief District Judge

JOHN B. HANNUM
District Judge

Motion to Alter or Amend Judgment Under Rule 59(e).

Intervenor defendant Crouter in the above matter, by his attorney, Henry T. Reath, Esquire, and Duane, Morris and Heckscher, moves Your Honorable Court to alter or amend its Order and Judgment of July 21, 1972, in the following respects and for the following reasons:

1. On July 21, 1972, a three judge Court, consisting of the Honorable Judges Hastie, Lord and Hannum, handed down its Order, copy of which is attached, granting plaintiffs' motion for summary judgment.

2. Intervenor defendant now moves Your Honorable Court to strike from said Order the following language:

> ". . . and it appearing that more than 90% of the children attending nonpublic schools in the Commonwealth of Pennsylvania are enrolled in schools that are controlled by religious organizations or that have the purpose of propagating and promoting religious faith, . . ."

3. There is no evidence of record that would support the foregoing statement of fact. To the contrary, the allegations bearing on the religious practices of schools who charge tuition that would be eligible for parent reimbursement, are contained in paragraph 10 of plaintiffs' complaint, all of which allegations were denied and put at issue in defendants' answer and that of intervenor defendants.

4. There is no evidence in this record as to the number of parents applying for reimbursement under the Act, since all the applications have not yet been received or processed. Furthermore, the application form does not require nor does the Act itself permit answers or inquiry regarding the religious or nonreligious practices of said schools. The

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only eligibility requirement is that the school meet the compulsory educational requirements of the Commonwealth.

5. Furthermore, said allegations were the subject of a special motion to strike filed on behalf of Your Petitioner on the grounds that said allegations were improper and irrelevant conclusions of law, and that any such inquiry into said facts insofar as parents eligible under the Act are concerned, violates their constitutional rights.

WHEREFORE, Your Petitioner respectfully moves the three judge Court to strike from its Order and Judgment the language quoted above in paragraph 2.

HENRY T. REATH,
for
DUANE, MORRIS & HECKSCHER,
Attorneys for Intervenor Defendant, Crouter.

Order.

AND NOW, this 3rd day of August, 1972, it is ORDERED that the motion of the intervenor defendant Crouter to alter or amend the judgment under Rule 59(e) be and it hereby is DENIED.

FOR THE COURT

JOSEPH S. LORD, III,
Ch. J.

Notice of Appeal.

Notice is hereby given that Henry E. Crouter, intervenor defendant in the above-captioned matter, appeals to the Supreme Court of the United States from the entire Order dated July 21, 1972, granting summary judgment to the plaintiffs and perpetually enjoining defendant Sloan from paying any funds of the Commonwealth of Pennsylvania pursuant to Act No. 92 of August 27, 1971, known as the "Pennsylvania Reimbursement Act for Nonpublic Education".

This appeal is taken pursuant to 28 U. S. C. § 1253.

HENRY T. REATH,
for
DUANE, MORRIS & HECKSCHER,
Attorneys for Intervenor Defendant, Crouter.

August 21, 1972.

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No. 92.

AN ACT.

HR 1379

Creating an authority for the purpose of avoiding increased costs of public education by providing partial reimbursement for nonpublic education and defining its powers and duties.

The General Assembly of the Commonwealth of Pennsylvania hereby enacts as follows:

Section 1. Short Title.—This act shall be known and may be cited as the "Parent Reimbursement Act for Nonpublic Education."

Section 2. Legislative Finding; Declaration of Policy.—It is hereby determined and declared as a matter of legislative finding:

(1) That parents who send their children to nonpublic schools assist the State in reducing the rising costs of public education.

(2) The welfare of the Commonwealth requires that this and future generations of school age children be assured ample opportunity to develop to the fullest their intellectual capacities. To further this objective the Commonwealth has had in force for many years a compulsory school attendance law.

(3) In the exercise of their constitutional right to choose nonpublic education for their children, parents who support such education make a major contribution to the public welfare. However, the immense impact

of inflation, plus sharply rising costs of education, now combine to place in jeopardy the ability of such parents fully to carry this burden.

(4) Should parents of children now enrolled in nonpublic schools be forced by economic circumstances to transfer any substantial number of their children to public schools, an enormous added financial, educational and administrative burden would be placed upon the public schools and upon the taxpayers of the State. Without allowance for inflationary increase, the annual operating cost of educating in public schools, the five hundred thousand students now enrolled in Pennsylvania's nonpublic schools would be an additional four hundred million dollars ($400,000,000). Necessarily added capital costs to construct new facilities or acquire existing facilities would be in excess of one billion dollars ($1,000,000,000). Any substantial portion of these operating and capital costs would be an intolerable public burden and present standards of public education would be seriously jeopardized. Therefore, parents who maintain students in nonpublic schools provide a vital service to the Commonwealth.

Wherefore, it is declared to be the public policy of the Commonwealth:

That, in order to reimburse parents partially for this service so vitally needed by the Commonwealth, and in order to foster educational opportunity for all children, a program of Parent Reimbursement for Nonpublic Education is hereby established.

Section 3. Definitions.—The following terms, whenever used or referred to in this act, shall have the following

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meanings, except in those instances where the context indicates otherwise:

(1) "Parent" means a resident of the Commonwealth of Pennsylvania who is a parent of a child enrolled in a nonpublic school or a person standing in loco parentis to such child.

(2) "Nonpublic school" means any school, other than a public school, within the Commonwealth of Pennsylvania, wherein a resident of the Commonwealth may legally fulfill the compulsory school attendance requirements of law and which meets the requirements of Title VI of the Civil Rights Act of 1964 (Public Law 88-352).

(3) "Student" means a resident of the Commonwealth of Pennsylvania who is enrolled in a nonpublic school.

(4) "Parent Reimbursement Fund" means the fund created by this act.

Section 4. Pennsylvania Assistance Authority.—There is hereby created a body corporate and politic to be known as the Pennsylvania Parent Assistance Authority, which shall consist of five members appointed by the Governor and which shall have responsibility for the administration of the program created by this act. All members shall be of full age, citizens of the United States, and residents of the Commonwealth and shall be appointed for terms of five years each. The members of the authority shall select from among themselves a chairman and a vice-chairman. The authority may employ a secretary and such other employes as it may require. Three members of the authority shall constitute a quorum for its meetings. Members shall receive no compensation for their services but shall be reim-

bursed for their expenses actually and necessarily incurred by them in the performance of their duties under this act. The authority shall have power to make and promulgate rules and regulations for the administration of this act: Provided, however, That it shall exercise no direction, supervision or control over the policy determinations, personnel, curriculum, program of instruction or any other aspect of the administration or operation of any nonpublic school or schools.

The authority shall have no power, at any time or in any manner to pledge the credit or taxing power of the Commonwealth, nor shall any of its obligations or debts be deemed to be obligations of the Commonwealth, and all contracts between the authority and parents or other persons in loco parentis shall be satisfied solely from funds provided under this act.

Section 5. Parent Reimbursement Fund.—There is hereby created for the special purpose of this act, a Parent Reimbursement Fund. Beginning July 1, 1971, twenty-three per cent of the tax revenue collected by the Department of Revenue, pursuant to the act of July 22, 1970 (P. L. 513), known as the "Pennsylvania Cigarette Tax Act," shall be paid into the State Treasury to the credit of the Parent Reimbursement Fund.

Moneys in the Parent Reimbursement Fund are hereby appropriated to the Pennsylvania Parent Assistance Authority, to be used solely for the purposes of this act.

All expenses incurred in connection with the administration of this act shall be paid solely out of the Parent Reimbursement Fund.

Section 6. Eligibility.—In order to be eligible for tuition reimbursement hereunder, the parent of a student

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shall, at the completion of the school year but not later than July fifteenth, file with the Parent Assistance Authority a verified statement that the student has completed the school year in a nonpublic school or schools and, in addition, the following information: (i) the name and address of the parent; (ii) the name, address and birth date of the student; (iii) the name and address of the nonpublic school or schools in which the student completed the school year and (iv) a receipted tuition bill or copy of the executed contract under which the student attended the nonpublic school or schools.

Section 7. Tuition Reimbursement Payments to Parents.—Upon the filing by a parent of the verified statement as required by section 6, the Parent Assistance Authority shall make a tuition reimbursement payment to such parent in the amount of (i) seventy-five dollars ($75) for each elementary school student to whom the parent bears a parental relationship and one hundred fifty dollars ($150) for each secondary student to whom the parent bears a parental relationship, or (ii) the actual amount of tuition paid or contracted to be paid by a parent, whichever is lesser.

Reimbursement payments to parents hereunder shall be made not later than September fifteenth in the school year following the school year for which tuition reimbursement payments are being made.

Section 8. Penalties.—The Parent Assistance Authority shall have power to employ means reasonably necessary to determine the accuracy of all statements submitted by parents in connection with reimbursement payments hereunder. Any person who, by means of a willfully false statement, secures or attempts to secure or aids or abets any person in securing reimbursement payment hereunder, shall

be guilty of a misdemeanor, and, upon conviction thereof, shall be sentenced to pay a fine of not exceeding one thousand dollars ($1,000), or to undergo imprisonment not exceeding one year, or both, and shall also be sentenced to make restitution of any moneys he has received by reason of any false statement.

Section 9. Insufficient Moneys in Fund.—In the event that, in any fiscal year, the total amount of moneys which were actually paid into the Parent Reimbursement Fund shall be insufficient to pay the total number of claims submitted by parents to the Parent Assistance Authority, the reimbursement payments provided for in section 7 shall be proportionate in amount to the per cent which the total amount of moneys in the Parent Reimbursement Fund bears to the total amount of claims.

Section 10. Severability.—If a part of this act is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of this act is invalid, in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications.

Section 11. Effective Date.—This act shall take effect immediately.

APPROVED—The 27th day of August, A. D. 1971.

MILTON J. SHAPP

The foregoing is a true and correct copy of Act of the General Assembly No. 92.

C. DELORES TUCKER
Secretary of the Commonwealth.

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IN THE

Supreme Court of the United States

October Term, 1972 No. 72-459

GRACE SLOAN, as State Treasurer of the Commonwealth of Pennsylvania

and

JOSE DIAZ and ENILDA DIAZ, His Wife, WILLIAM ZIMMERSPITZ and NANCY ZIMMERSPITZ, His Wife, F. CARL KRETZMAN and KATHERYN L. KRETZMAN, His Wife, ARTHUR HARVEY and MURIEL HARVEY, His Wife, DANIEL F. X. POWELL and ANNA T. POWELL, His Wife, SETH W. WATSON, JR., and ANNE P. WATSON, His Wife, and HENRY E. CROUTER,

Petitioners

v.

ALTON J. LEMON, NEAL F. BRACKEN and BENJAMIN S. LOWENSTEIN,

Respondents

MOTION TO DISMISS OR AFFIRM

On Appeal from The United States District Court for the Eastern District of Pennsylvania

Pursuant to Rule 16 of the Rules of this Court, the appellees herein move to dismiss the appeal or to affirm the judgment of the Court below on the ground that the ques-

tions upon which review is sought have been rendered so insubstantial by the well-reasoned opinion of the District Court and by this Court's decision in *Wolman v. Essex*, 342 F. Supp. 399 (E. D. Ohio), *aff'd* — U.S. —, U.S. Law Week —, (1972) that no further review by this Court is necessary.

QUESTIONS PRESENTED

The basic questions presented by this appeal are whether the Pennsylvania Parent Reimbursement Act for Nonpublic E[illegible]on violates the Establishment Clause of the First Amendment to the Constitution of the United States and whether the denial of benefits to parents under that Act is a denial of equal protection under the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

COUNTER-STATEMENT OF THE CASE

Act 94 of 1971 provides that the state shall make payments to any parent who had paid tuition, for the already completed school year, for the education of a child in a nonpublic school. The payments are tuition in that they are made to reimburse parents for tuition already paid and are intended to support both religious and secular education at these schools. The state has not taken any steps to preclude the use of its funds to support religious activities.

The appellees accept, to the extent not restated in the above paragraph, the remainder of the Statement of the Case as set forth by the appellants in their Jurisdictional Statement, on pages 4-8.

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ARGUMENT

There is nothing we can add to the excellent opinion of Chief District Judge Joseph S. Lord III, except to note that on October 10, 1972, this Court held that a substantially identical case did not present a substantial federal question in *Wolman v. Essex*, 342 F. Supp. 399 (S. D. Ohio), *aff'd.* — U.S. — (1972).

CONCLUSION

The judgment of the District Court should be affirmed because its decision has rendered insubstantial the questions which the appellants ask this Court to review.

Respectfully submitted

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Attorneys for Appellees

October, 1972

CERTIFICATE OF SERVICE

THEODORE R. MANN, ESQUIRE, hereby certifies that copies of the within Motion to Dismiss or Affirm were mailed, postage prepaid, on October 13, 1972 to counsel for appellants at the following addresses:

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Theodore R. Mann

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-459

GRACE SLOAN, as State Treasurer of the Commonwealth of Pennsylvania,

—and—

JOSE DIAZ and ENILDA DIAZ, his wife WILLIAM ZIMMERSPITZ and NANCY ZIMMERSPITZ, his wife, F. CARL KRETZMANN and KATHERYN L. KRETZMANN, his wife, ARTHUR HARVEY and MURIEL HARVEY, his wife, DANIEL F. X. POWELL and ANNA T. POWELL, his wife, SETH W. WATSON, JR., and ANNE P. WATSON, his wife, and HENRY E. CROUTER, *Appellants*,

v.

ALTON J. LEMON, NEAL F. BRACKEN, and BENJAMIN S. LOWENSTEIN, *Appelles*.

On Appeal from the United States District Court for the Eastern District of Pennsylvania

REPLY BRIEF OF APPELLANTS JOSE DIAZ AND ENILDA DIAZ, HIS WIFE, WILLIAM ZIMMERSPITZ AND NANCY ZIMMERSPITZ, HIS WIFE, F. CARL KRETZMANN AND KATHERYN L. KRETZMANN, HIS WIFE, ARTHUR HARVEY AND MURIEL HARVEY, HIS WIFE, DANIEL F. X. POWELL AND ANNA T. POWELL, HIS WIFE, SETH W. WATSON, JR., AND ANNE P. WATSON, HIS WIFE.

(Signatures on page 2 of cover)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-459

GRACE SLOAN, as State Treasurer of the Commonwealth of Pennsylvania,

—and—

JOSE DIAZ and ENILDA DIAZ, his wife WILLIAM ZIMMERSPITZ and NANCY ZIMMERSPITZ, his wife, F. CARL KRETZMANN and KATHERYN L. KRETZMANN, his wife, ARTHUR HARVEY and MURIEL HARVEY, his wife, DANIEL F. X. POWELL and ANNA T. POWELL, his wife, SETH W. WATSON, JR., and ANNE P. WATSON, his wife, and HENRY E. CROUTER, *Appellants*,

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ALTON J. LEMON, NEAL F. BRACKEN, and BENJAMIN S. LOWENSTEIN, *Appelles*.

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REPLY BRIEF OF APPELLANTS JOSE DIAZ AND ENILDA DIAZ, HIS WIFE, WILLIAM ZIMMERSPITZ AND NANCY ZIMMERSPITZ, HIS WIFE, F. CARL KRETZMANN AND KATHERYN L. KRETZMANN, HIS WIFE, ARTHUR HARVEY AND MURIEL HARVEY, HIS WIFE, DANIEL F. X. POWELL AND ANNA T. POWELL, HIS WIFE, SETH W. WATSON, JR., AND ANNE P. WATSON, HIS WIFE.

ARGUMENT

The Appellees, in their Motion to Dismiss or Affirm, assert that the decision of this Court in *Wolman* v. *Essex*, 342 F.Supp. 399 (E.D. Ohio), *aff'd.*, U.S. , U.S. Law Week (1972), is dispositive of appeal. This contention is unfounded.

1. Twelve Pennsylvania Parents Are Now Before This Court, Raising Equal Protection Arguments Not Raised in the Ohio Case Nor Ever Previously Presented Here.

Mr. and Mrs. Diaz, Mr. and Mrs. Watson and eight other parents sought and were granted intervention in this case. They have raised affirmative defenses based upon the Equal Protection Clause which have never been presented to this Court.

Essex v. *Wolman* did not present any question of Equal Protection either respecting parents whose children attend nonsecretarian schools nor respecting parents whose children attend secretarian schools. No parents were before the Court in that case. Here the parents are, and here those claims are raised.

Due Process demands that these parents be heard. The Equal Protection claims which they have raised are surely not less substantial than constitutional claims which this Court has recognized in many other cases. *Cf. Graham* v. *Richardson,* 403 U.S. 365 (1971) (denial of welfare benefits to aliens unless they have resided in the United States a specified number of years); *Humphrey* v. *Cady,* — U.S. —, 31 L. Ed. 2d 394 (1972) (committing individual to a "sex deviate facility" without jury determination, when similar statute dealing with mental incompetents provided for one); *Shapiro* v. *Thompson,* 394 U.S. 618 (1969) (restricting right of welfare recipents to travel). The Appellees

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would have the voices of these parents suppressed and deny to these people the opportunity—*on questions of first impression*—to file a brief and present one half hour's argument to this Court on their claims. Yet it is a fact that these parents are cruelly pressed between the demand of the state that their children attend school, and the demands of religious conscience that those children have what this Court has said must be denied them if they attend public school: a moral and religious formation based upon knowledge and love of God. Parents whose children attend nonsectarian schools are likewise caught between the demands of compulsory attendance and those of intellectual freedom. *Pierce* v. *Hill Military Academy,* 268 U.S. 510 (1925). These parents are not, in today's frightening tax-and-inflation economy, answered by the simplicism, "If they want those freedoms through nonpublic schools, let them pay for them". More importantly, *their Equal Protection arguments were denied any response whatever by the court below, though specially pleaded, briefed and argued*—a travesty of due process which must not be confirmed by this Court.

2. To Grant Appellees' Motion to Dismiss or Affirm Would Leave a Vital Area of the Law in a State of Confusion.

This Court has formulated three tests which legislation must pass in order to withstand the strictures of the Establishment Clause: (a) that of causing no "excessive entanglements" between church and state (b) that of having no "primary effect which advances religion" and (c) that of "secular legislative purpose".

The Court did not specify which of these grounds was the basis for its affirmance in *Essex,* and thus future legislators and litigants are left to speculation

concerning a now prominent area of social legislation and interest. Granting Appellees' Motion to Dismiss or Affirm, without briefing, oral argument and opinion, will only compound this confusion.

It is clear, in any event, that the Pennsylvania case may not be disposed of, as Appellees urge, by the application to it of *Essex*. The Pennsylvania statute differs significantly from the Ohio statute struck down in that case. For example, the challenged and offensive portion of the Ohio statute is woven into the fabric of the Ohio public school district financing legislation. Furthermore, the Ohio statute calls for annual appropriations. Therefore it may have been adjudged by this Court to be void under the test of "excessive entanglement". The Pennsylvania statute is not financed through annual appropriations and does not remotely involve any such entanglement. The District Court found none. Since it is clear that the statute passes the test of "secular legislative purpose" *, and that it contains no feature of "excessive entanglement", the sole remaining basis for voiding the statute would be found in the test of "primary effect which advances religion".

But the "primary effect" test has never before been applied by this Court to a statute such as Pennsylvania's. It cannot be presumed—indeed it would be impertinence to assert—that this Court, in *Essex,* applied *sub silentio* the "primary effect" test. Not since 1968, in *Board of Education* v. *Allen,* 392 U.S. 236 (1968), has the Court applied that test in any case involving use of state funds to afford benefits to chil-

* The District Court found that the statute passes the "secular legislative purpose" test, and that conclusion appears settled. See *Lemon* v. *Kurtzman,* 403 U.S. 602, 613 (1971).

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dren in nonpublic schools, or their parents. *Lemon* v. *Kurtzman, supra,* involved state payments to such schools, but the Court therein declined to apply the "primary effect" test (after having stated that inquiry into Pennsylvania's legislative purposes in enacting the statute there considered "affords no basis for a conclusion that the legislative intent was to advance religion"). *Id.* at 613. To accede to Appellees' request that the Court, in effect, leap-frog from *Allen* to today's Pennsylvania statute, without briefs, without oral argument (and therefore without the fullest possible basis for opinion), would be to make a denigrating mockery of the work of state legislatures. It would further work a marked injustice to the interests of millions of citizens who have honestly labored to find a means of financially safeguarding religious and intellectural liberty in education, not through circumventing the Constitution, but through complying with what this Court itself has held under the Constitution.

The intervening parents, in their Jurisdictional Statement, have pointed out to the Court other questions occasioned by the District Court's decision herein. Prominent among these are its invention of a fourth Establishment Clause test—namely, that a "possible and quite likely" use of public funds for religion renders void the statute which affords the funds. Such a test, claimed to be found in *Tilton* v. *Richardson,* 403 U.S. 672 (1971), is without a pebble of basis in that case and, furthermore, has implications of staggering magnitude. See Jurisdictional Statement, 12-14.

CONCLUSION

In view of the foregoing, the Appellant parents, Jose Diaz, *et al.*, pray that the Court note probable jurisdiction herein and that they be given the opportunity to present a brief and oral argument to the Court.

Respectfully submitted,

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MICHAEL RODAK, JR

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-459

GRACE SLOAN, as State Treasurer of the Commonwealth of Pennsylvania,

—and—

JOSE DIAZ and ENILDA DIAZ, *his wife* WILLIAM ZIMMERSPITZ and NANCY ZIMMERSPITZ, his wife, F. CARL KRETZMANN and KATHERYN L. KRETZMANN, his wife, ARTHUR HARVEY and MURIEL HARVEY, his wife, DANIEL F. X. POWELL and ANNA T. POWELL, his wife, SETH W. WATSON, JR., and ANNE P. WATSON, his wife, and HENRY E. CROUTER, *Appellants,*

v.

ALTON J. LEMON, NEAL F. BRACKEN, and BENJAMIN S. LOWENSTEIN, *Appellees.*

On Appeal from the United States District Court for the Eastern District of Pennsylvania

REPLY BRIEF OF APPELLANT GRACE SLOAN, AS STATE TREASURER OF THE COMMONWEALTH OF PENNSYLVANIA

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Attorney General
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-459

GRACE SLOAN, as State Treasurer of the Commonwealth of Pennsylvania,

—and—

JOSE DIAZ and ENILDA DIAZ, *his wife* WILLIAM ZIMMERSPITZ and NANCY ZIMMERSPITZ, his wife, F. CARL KRETZMANN and KATHERYN L. KRETZMANN, his wife, ARTHUR HARVEY and MURIEL HARVEY, his wife, DANIEL F. X. POWELL and ANNA T. POWELL, his wife, SETH W. WATSON, JR., and ANNE P. WATSON, his wife, and HENRY E. CROUTER, *Appellants,*

v.

ALTON J. LEMON, NEAL F. BRACKEN, and BENJAMIN S. LOWENSTEIN, *Appelles.*

On Appeal from the United States District Court for the Eastern District of Pennsylvania

---

ARGUMENT

The Motion to Dismiss or Affirm, presented by the Appellees herein, takes the position that the decision of the Supreme Court in *Wolman* v. *Essex,* 342 F.Supp. 399 (E.D. Ohio), *aff'd.,* — U.S. — (1972), — U.S. Law Week —, (1972), removed from the instant case any possibility that it presents a substantial federal question.

The Commonwealth of Pennsylvania is of the view that *Wolman* v. *Essex* cannot be regarded as here controlling.

We have been seriously endeavoring to find a constitutional means for relief of the problem presented by the fact that one-fifth of our school population attends nonpublic schools pursuant to our compulsory attendance laws. This Court has expressed itself on Establishment Clause issues relating to public aid to nonpublic education only in *Everson* v. *Board of Education,* 330 U.S. 1 (1947), *Board of Education* v. *Allen,* 392 U.S. 236 (1968), *Lemon* v. *Kurtzman,* 403 U.S. 602 (1971), and *Tilton* v. *Richardson,* 403 U.S. 672 (1971). Its affirmance in *Wolman* v. *Essex* leaves the Commonwealth of Pennsylvania without guidelines as to the constitutional law pertaining to aid to nonpublic (including sectarian) education.

The Pennsylvania statute, herein challenged, is significantly different from the Ohio statute struck down in *Essex.* Further, constitutional issues are raised in the instant case which were not before the court in *Essex.*

The Commonwealth renews its plea that the Court hear argument in this case, and, in an opinion thereafter, afford the several states the benefit of the Court's teaching on the extremely serious issues presented.

Respectfully submitted,

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Sup. Ct. U.S.
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MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

October Term, 1972.

No. ~~72-459~~ 72-620

GRACE SLOAN, as State Treasurer of the Commonwealth of Pennsylvania,

and

JOSE DIAZ and ENILDA DIAZ, His Wife, WILLIAM ZIMMERSPITZ and NANCY ZIMMERSPITZ, His Wife, F. CARL KRETZMANN and KATHERYN L. KRETZMANN, His Wife, ARTHUR HARVEY and MURIEL HARVEY, His Wife, DANIEL F. X. POWELL and ANNA T. POWELL, His Wife, SETH W. WATSON, JR., and ANNE P. WATSON, His Wife, and HENRY E. CROUTER,

Appellants,

v.

ALTON J. LEMON, NEAL P. BRACKEN, and BENJAMIN S. LOWENSTEIN,

Appellees.

On Appeal From the United States District Court for the Eastern District of Pennsylvania.

BRIEF OF NATIONAL ASSOCIATION OF INDEPENDENT SCHOOLS, INC., AMICUS CURIAE.

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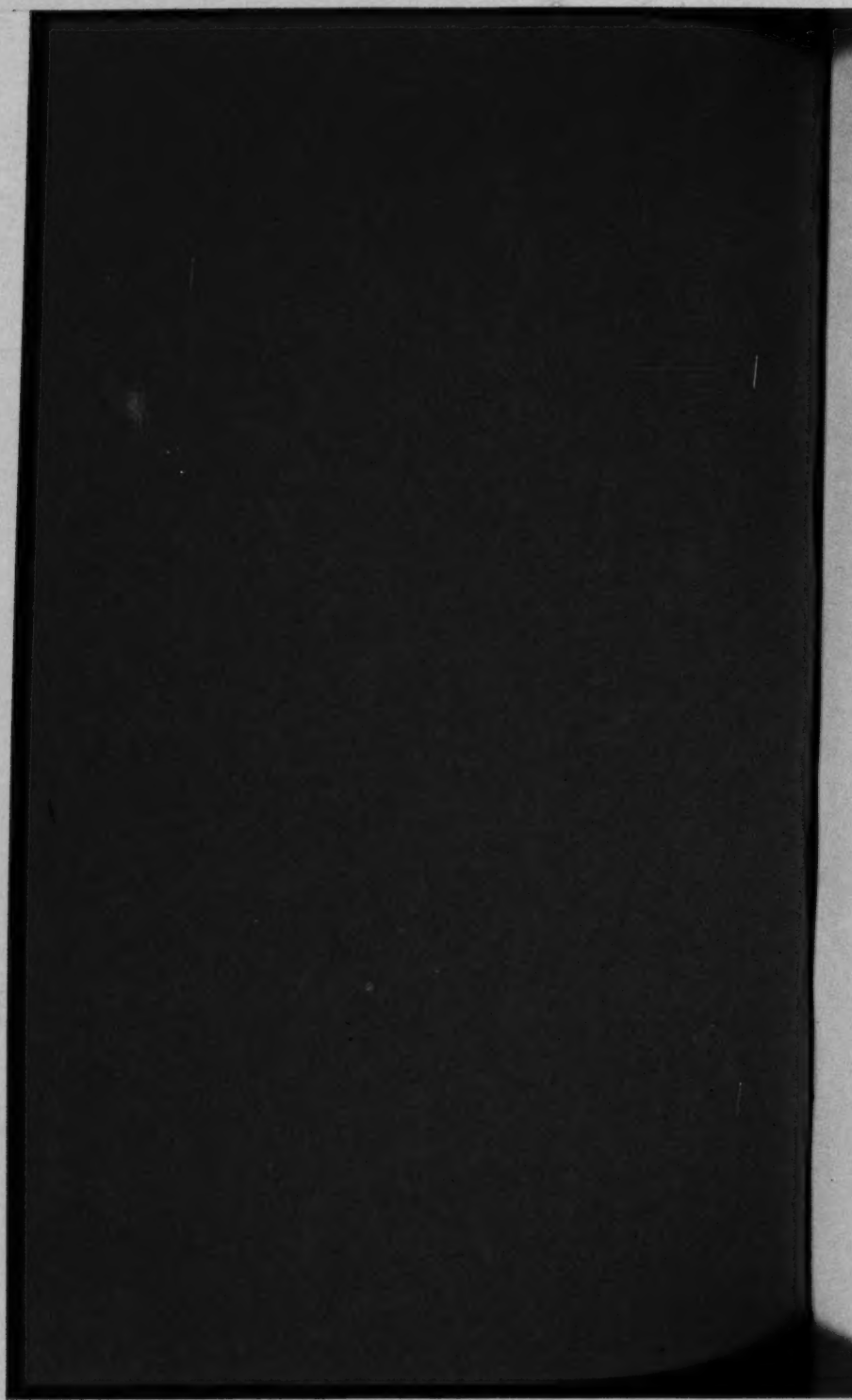

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INTEREST OF THE AMICUS.

This brief is submitted with the consent of counsel for the parties, on behalf of the National Association of Independent Schools, Inc. ("the Association"), a Massachusetts corporation.

The Association's membership comprises approximately 768 independent schools engaged in primary and secondary education in 43 states of the United States, including 56 schools in the Commonwealth of Pennsylvania. Its membership also includes 27 regional school associations (one of which is the Pennsylvania Association of Independent Schools, Amicus Curiae, below), and 16 other associations of teachers, alumni and scholarship groups connected with independent schools.

The stated purposes of the Association are

> "to assist and strengthen independent schools in the United States . . . to aid them to serve effectively the free society from which they derive their independence." National Association of Independent Schools, Inc., By-Laws, Art. II.

STATEMENT OF THE CASE.

Non-public education, embracing as it does a wide spectrum of sectarian and non-sectarian schools, which reflect the divergent religious faiths of our heritage, is an important and vital part of our total national educational establishment.

We need not here document the devastating effect the collapse of these schools would have, not only in terms of the additional financial burden to the tax-paying public, but also the severe damage to the national interests generally,

because of the wide range of educational diversity they provide. And as so effectively stated by President Nixon in his Message to the Congress of March 3, 1970, "these schools—non-sectarian, Catholic, Protestant, Jewish and other—often add a dimension of spiritual value giving children a moral code by which to live. This government cannot be indifferent to the potential collapse of such schools."

The Association files this brief because it believes there are serious national implications to the important, and never before ruled upon, constitutional issues affecting aid to parents raised by the appeal in the Pennsylvania case.

As a spokesman for the role of independent education in a free democratic society, we laud the Pennsylvania program of assistance to education that gives aid to parents.

To say, as some critics do—and without a shred of evidence to support it—that the parent acts as a mere conduit to the school, is to denigrate the very stuff of which this country's greatness was made and to undermine the rock upon which our Constitution and Bill of Rights is grounded—personal freedom and the right of each individual to make his own free choice.

Where the parent is the recipient of state aid, he alone decides how and where the funds are applied and thus effectively cuts off state control or participation, thereby enabling the state to aid its legitimate interests in secular education, and at the same time, to preserve, in the words of the Chief Justice, the spirit of "benevolent neutrality" which will neither advance nor inhibit religion.

This is in the best tradition of a country that treasures its private institutions and the freedom and rights of individuals. Far from offending the Constitution, tuition aid to parents supports and reinforces the very principles the Constitution was designed to protect.

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For the reasons set forth above, and in the jurisdictional statement of appellant Henry E. Crouter, which is incorporated by reference herein, the National Association of Independent Schools, Inc. urges this Court to assume jurisdiction of the appeal and to determine after full consideration of briefs and oral argument, whether the Pennsylvania Parent Reimbursement Act is constitutional under the First Amendment.

Respectfully submitted,

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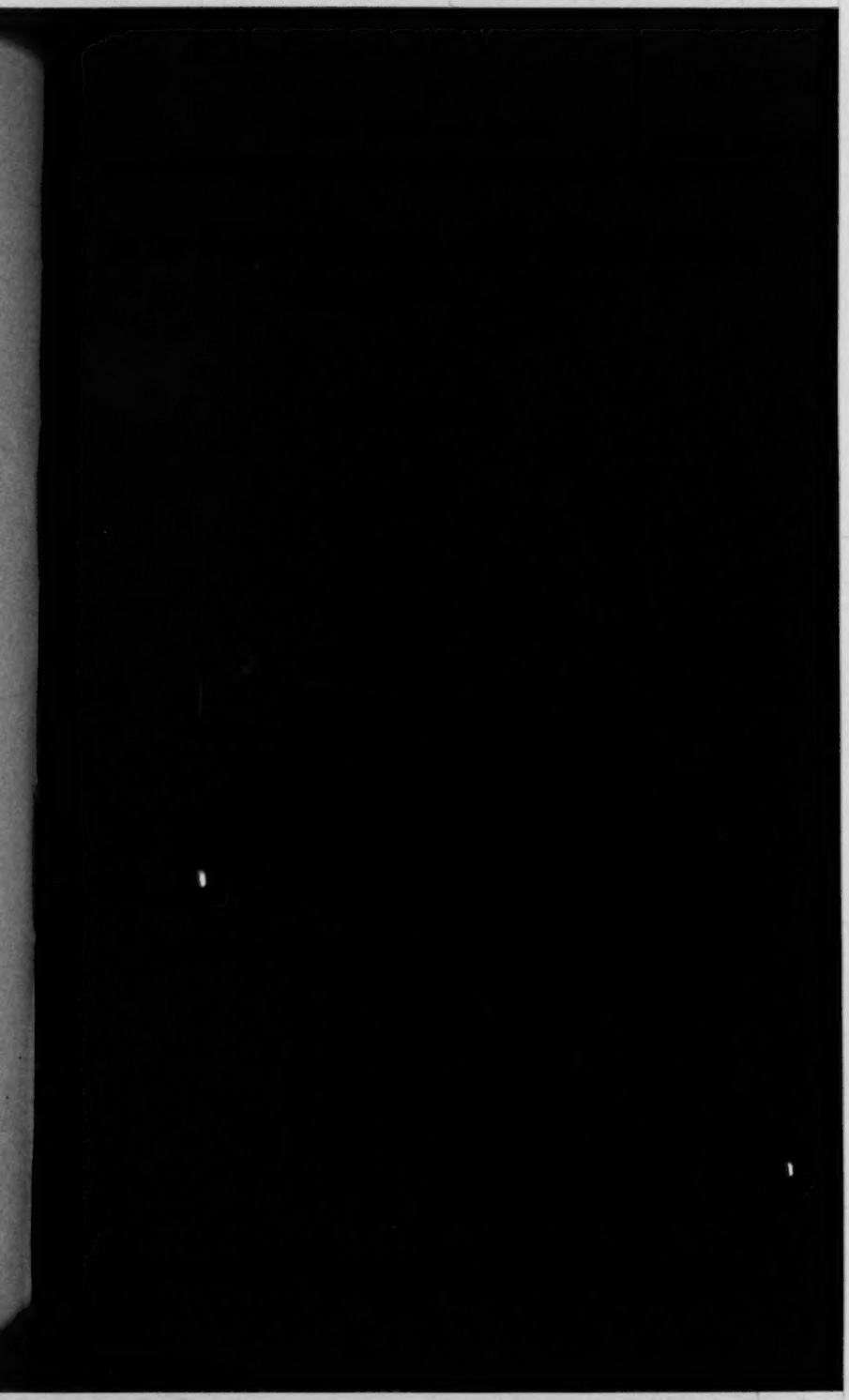

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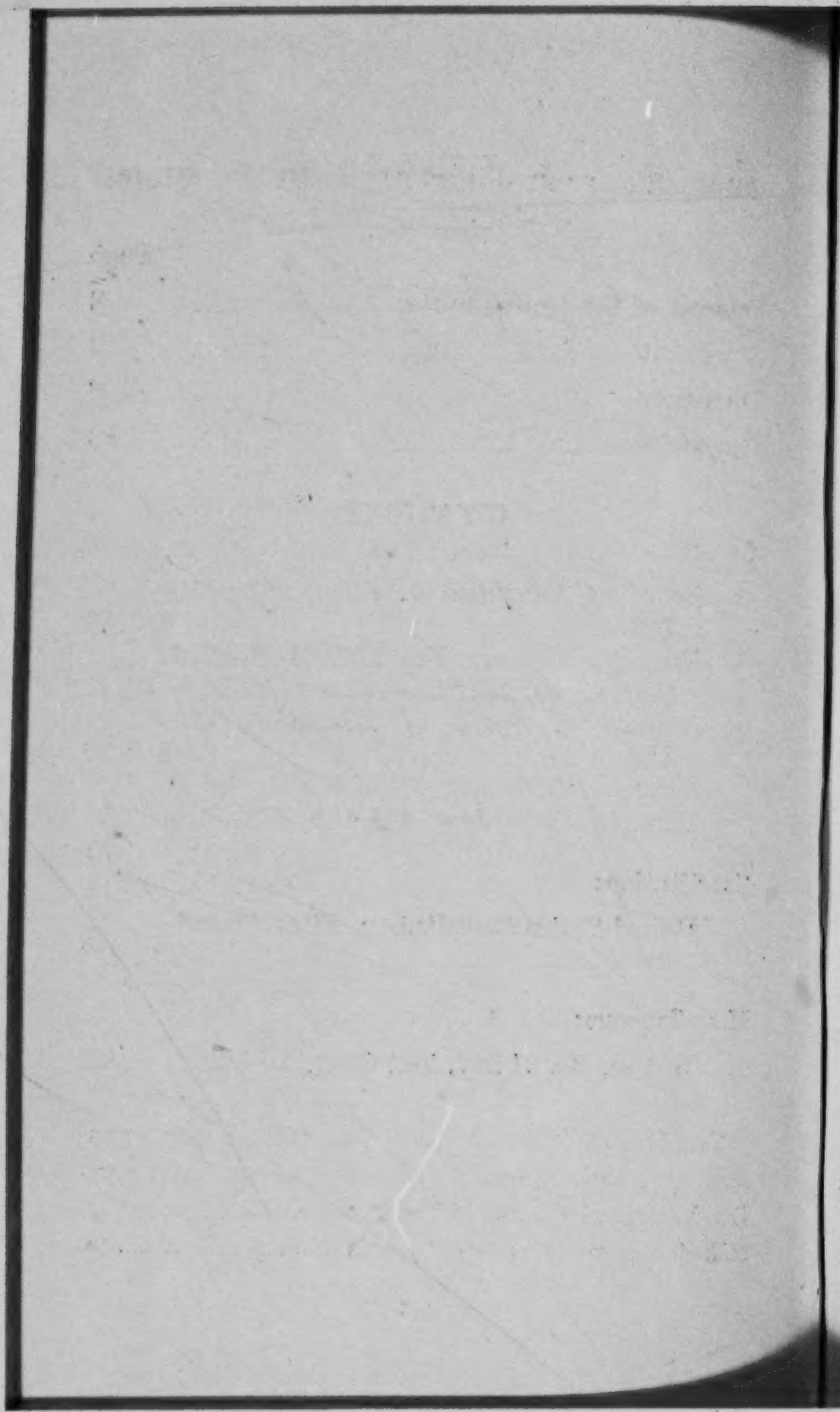

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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-459

SLOAN, ET AL.

v.

LEMON, ET AL.

No. 72-620

CROUTER

v.

LEMON, ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MEMORANDUM FOR THE UNITED STATES AS *AMICUS CURIAE*

The United States believes that these appeals present an important constitutional question under the Establishment Clause of the First Amendment which calls for plenary review by this Court, and it there-

fore urges that the Court note probable jurisdiction in these cases. The issue is whether the Establishment Clause, made applicable to the states by the Fourteenth Amendment, bars a state from reimbursing parents for a portion of the tuition fees they have paid for sending their children to religiously-affiliated private schools.

INTEREST OF THE UNITED STATES

It is the policy of the United States to improve the quality of education and to promote the maximum availability and utilization of educational resources, while respecting the rights of parents to send their children to non-public schools which they believe best meet their children's needs. As the President stated in his message to Congress on Educational Reform on March 3, 1970:

> The non-public elementary and secondary schools in the United States have long been an integral part of the nation's educational establishment—supplementing in an important way the main task of our public school system. The non-public schools provide a diversity which our educational system would otherwise lack. They also give a spur of competition to the public schools through which educational innovations come, both systems benefit, and progress results.
>
> Should any single school system—public or private—ever acquire a complete monopoly over the education of our children, the absence of competition would neither be good for that school system nor good for the country. The non-public

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schools also give parents the opportunity to send their children to a school of their own choice, and of their own religious denomination. They offer a wider range of possibilities for education experimentation and special opportunities for minorities, especially Spanish-speaking Americans and black Americans.

Up to now, we have failed to consider the consequences of declining enrollments in *private* elementary and secondary schools, most of them church supported, which educate 11% of all pupils—close to six million school children. In the past two years, close to a thousand nonpublic elementary and secondary schools closed and most of their displaced students enrolled in local public schools.

If most or all private schools were to close or turn public, the added burden on public funds by the end of the 1970s would exceed $4 billion per year in operations, with an estimated $5 billion more needed for facilities. [H. Doc. No. 91-267, 91st Cong., 2d Sess., p. 9.]

STATEMENT

These cases involve the constitutionality of the Pennsylvania Parent Reimbursement Act for Nonpublic Education, under which the state reimburses parents who send their children to nonpublic schools. The Act, which was adopted in August 1971, is based upon legislative findings that parents who send their children to such schools "assist the State in reducing the rising costs of public education" and "provide a vital service to the Commonwealth;" that "[i]n the exercise of their constitutional right to choose non-

public education for their children, parents who support such education make a major contribution to the public welfare," but that "the immense impact of inflation, plus sharply rising costs of education, now combine to place in jeopardy the ability of such parents fully to carry this burden"; and that "[s]hould parents of children now enrolled in nonpublic schools be forced by economic circumstances to transfer any substantial number of their children to public schools, an enormous added financial, educational and administrative burden would be placed upon the public schools and upon the taxpayers of the State," which "would be an intolerable public burden and present standards of public education would be seriously jeopardized" (J.S. No. 72-459, pp. 20a-21a).[1]

"[I]n order to reimburse parents partially for this service so vitally needed by the Commonwealth, and in order to foster educational opportunity for all children," the state established "a program of Parent Reimbursement for Nonpublic Education" (*id.* p. 21a). It provides that parents who file a verified statement that their child has completed a school year in a nonpublic school within the state that meets the requirements of the state's compulsory school attendance law and of Title VI of the Civil Rights Act of 1964 (which prohibits discrimination) are entitled to a tuition reimbursement payment of $75 for each elementary school student and $150 for each secondary school student (*id.* pp. 23a-24). A Parent

[1] All the references to "J.S." are to No. 72-459.

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Reimbursement Fund is to be maintained by payment to the fund of 23 percent of the revenues received under the state's Cigarette Tax Act (*id.* p. 23a).

In a suit challenging the Parent Reimbursement Act as violating the Religion Clauses of the First Amendment, a three-judge district court held that "the Establishment Clause precludes state reimbursement of sums that parents have paid as tuition to schools that provide religious education" (*id.* p. 15a) and enjoined the payment of any funds thereunder "either directly or by way of reimbursement to parents of children attending nonpublic schools" (*id.* p. 17a). The court, relying on the legislative determination of policy, ruled that "the Act expresses a legitimate secular objective consistent with the Establishment Clause" (*id.* pp. 5a-6a). The court held, however, that "the Act has the primary effect of advancing religion" (*id.* p. 5a). It stated that "the fact that aid is given to parents in itself does not prevent the subsidy from having a primary effect of supporting religious instruction and worship in church-related schools" (*id.* p. 12a), and that "the court must examine the character of the aided activity rather than the manner in which aid is given in order to determine whether the state subsidy has the primary effect of advancing religion" (*ibid.*). It concluded that since "the effect of the Act is to aid the schools * * * the failure of the state to insure that the funds are restricted to secular education or general welfare services renders the Act unconstitutional" (*ibid.*). Finally, it held that even if "the Act does not aid sectarian schools, we must still

conclude that the Act supports religion because it aids parents in providing a religious education for their children" (*id.* p. 14a).

DISCUSSION

1. In *Lemon* v. *Kurtzman*, 403 U.S. 602, this Court summarized the three criteria which it has applied in determining whether a statute satisfies the Establishment Clause (pp. 612-613):

> First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, *Board of Education* v. *Allen*, 392 U.S. 236, 243 (1968); finally, the statute must not foster "an excessive government entanglement with religion." *Waltz*, [397 U.S. 664], 674.

See, also, *Tilton* v. *Richardson*, 403 U.S. 672, 678, where the plurality opinion of the Chief Justice noted that these criteria should not be viewed "as 'tests' in any limiting sense of that term * * * [but] should rather be viewed as guidelines with which to identify instances in which the objectives of the Religion Clauses have been impaired."

In the present case, the district court correctly recognized that the purpose of the Pennsylvania Parent Reimbursement Act is secular, since the legislative objective was "with maintaining the present standards of public education which it finds would be severely jeopardized if parents of nonpublic school children could no longer afford tuition costs and were forced to send their children to public schools" (J.S.

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p. 5a). Cf. *Lemon* v. *Kurtzman*, *supra*, 403 U.S. at 613.

The Pennsylvania plan does not have the vices of the statutes which the Court invalidated in *Kurtzman* as "involv[ing] excessive entanglement between government and religion" (403 U.S. at 614). The statutes there struck down provided for state payments directly to religiously-affiliated schools to be used to pay salaries of teachers in those schools instructing in secular subjects, and payments to the teachers themselves. The Court noted that "[a] comprehensive, discriminating, and continuing state surveillance will inevitably be required to ensure that these restrictions are obeyed and the First Amendment otherwise respected" (403 U.S. at 619).

In the present cases, however, there is no excessive involvement between government and religion. This Act, unlike the prior Pennsylvania statute involved in *Kurtzman*, does not have the "defect of providing state financial aid directly to the church-related school" (p. 621), since the payments are made to the parents. Moreover, there is no legislative involvement by the state in the year-to-year operation of the program through the making of annual appropriations (cf. *Kurtzman*, 403 U.S. at 622); the financing of the plan is self-executing, through the transfer to the program of 23 percent of the state's revenues from the cigarette tax. Finally, the state does not examine or evaluate the education provided in the schools to insure that the schools are complying with statutory restrictions limiting use of the funds to

providing secular education. The sole role of the state is the ministerial one of insuring that the parents' application is in proper form and that the nonpublic schools which the children attend satisfied the requirements of the state's school law.

This leaves for discussion only the second criterion for evaluating the Act: whether "its principal or primary effect * * * [is] one that neither advances nor inhibits religion" (*Kurtzman*, 403 U.S. at 612). The district court interpreted this Court's decisions explaining and applying the Establishment Clause as indicating that the Pennsylvania parent tuition reimbursement plan had the principal effect of advancing religion. We submit, however, that those decisions do not require that conclusion but rather point in the opposite direction, and that in any event they do not themselves require invalidation of the Pennsylvania plan.

In a series of landmark cases, this Court has distinguished between state programs through which the state directly aids religion and those in which it performs a secular function which incidentally benefits religion; the former violate the Establishment Clause and the latter do not. The Court has upheld, as consistent with the Establishment Clause, the reimbursement of parents of school children for bus transportation expenses in attending parochial schools (*Everson* v. *Board of Education*, 330 U.S. 1), and the lending by the state of textbooks to all school children, including those attending religiously-affiliated schools (*Board of Education* v. *Allen*, 392

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U.S. 236). In *Tilton* v. *Richardson*, *supra*, it upheld federal grants to Catholic colleges to be used for secular purposes, *i.e.*, construction of non-religious buildings and supplying equipment for non-religious courses and activities.

In contrast, as noted, the state statutes struck down in *Lemon* v. *Kurtzman*, *supra*, involved direct payments by the state to church-affiliated schools to be used for the payment of the salaries of teachers in those schools, and to the teachers themselves. There, unlike *Everson*, *Allen* and *Tilton*, the government aid to the religiously-affiliated schools was immediate and direct.

The present case, we submit, is governed by the *Everson*, *Allen* and *Tilton* line of authority rather than by *Lemon* v. *Kurtzman*. The parent tuition reimbursement program involves no payment at all by the state directly to the schools or teachers and no involvement by the state in the religious content of the curriculum. In *Lemon* v. *Kurtzman*, *supra*, the Court pointed out (403 U.S. at 621):

> The Pennsylvania statute, moreover, has the further defect of providing state financial aid directly to the church-related school. This factor distinguishes both *Everson* and *Allen*, for in both those cases the Court was careful to point out that state aid was provided to the student and his parents—not to the church-related school. * * *

Of course, the reimbursement to the parents of part of the tuition they have paid to religiously-affiliated schools aids the schools in the same way that the re-

imbursement of bus transportation costs in *Everson*, the loan of textbooks in *Allen* and the grants in *Tilton* did "in the sense that religious bodies would otherwise have been forced to find other sources from which to finance these services. Yet all of these forms of governmental assistance have been upheld. [Citations omitted.] The crucial question is not whether some benefit accrues to some religious institution as a consequence of a legislative program, but whether its principal or primary effect advances religion" (*Tilton* v. *Richardson*, 403 U.S. at 679). We submit that the principal or primary effect of the Pennsylvania Act is not the advancement of religion, but the advancement of education.

2. In *Essex* v. *Wolman*, No. 71-1664, the Court, on October 10, 1972, summarily affirmed the judgment of a three-judge district court which invalidated, under the Establishment Clause, an Ohio parent reimbursement statute similar to the Pennsylvania Act involved in these appeals. We do not believe that that action warrants the same disposition of these appeals.

In their motion to affirm in the *Essex* case, the appellees conceded that the validity of the Ohio tuition reimbursement plan "involves important questions of First Amendment law" (Motion to Affirm, p. 3), but argued that under *Lemon* v. *Kurtzman* the Ohio plan is invalid (*id.* pp. 3, 7). The jurisdictional statement in *Essex* did not discuss *Kurtzman* (pp. 9-15), and no brief was filed in reply to the motion to affirm. As developed in this memorandum

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and in the jurisdictional statements filed in the present cases, however, *Lemon* v. *Kurtzman* does not require invalidation of the Pennsylvania tuition reimbursement plan; rather, other decisions of this Court support its validity. In any event, as we have argued in this memorandum, the constitutional validity of this form of indirect state aid to nonpublic schools is an issue on which this Court has not definitively spoken and one that, in view of its great importance to the country, warrants plenary review.[2]

---

[2] The Ohio statute invalidated in *Essex* is different from the Pennsylvania statute in at least one significant respect. The Ohio statute required substantial involvement by both the State Board of Education and the State Legislature in fixing the total amount the state would provide for tuition reimbursement. J.S. No. 71-1664, pp. 18-20, 50-51. The statute thus directly posed the danger of the "successive and very likely permanent annual appropriations that benefit relatively few religious groups" which concerned the Court in *Lemon* v. *Kurtzman*, 403 U.S. at 623.

The Pennsylvania statute, on the other hand, avoids that problem, since it provides that 23 percent of the total receipts from the state cigarette tax will be paid into the parent reimbursement fund from which the tuition reimbursement payments are to be made. If the amount thus generated for the fund is insufficient to pay the $75 and $150 reimbursements, their amount is to be reduced *pro tanto* (J.S. 24a-25a). There will accordingly be no occasion for further legislative involvement or political debate once the program is placed in operation. Cf. *Tilton* v. *Richardson*, 403 U.S. at 688.

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted.

DANIEL M. FRIEDMAN,
*Acting Solicitor General.**

NOVEMBER 1972.

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* In lieu of the Solicitor General, who is disqualified for personal reasons.

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Supreme Court of the United States

OCTOBER TERM, 1972 No. 72-459

GRACE SLOAN, AS STATE TREASURER OF THE COMMONWEALTH OF PENNSYLVANIA,

and

JOSE DIAZ and ENILDA DIAZ, his wife, WILLIAM ZIMMERSPITZ and NANCY ZIMMERSPITZ, his wife, F. CARL KRETZMANN and KATHERYN L. KRETZMANN, his wife, ARTHUR HARVEY and MURIEL HARVEY, his wife, DANIEL F. X. POWELL and ANNA T. POWELL, his wife, SETH W. WATSON, JR., and ANNE P. WATSON, his wife and HENRY E. CROUTER,

Appellants,

vs.

ALTON J. LEMON, NEAL F. BRACKEN, and BENJAMIN S. LOWENSTEIN,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIEF OF CITY OF PHILADELPHIA, AMICUS CURIAE

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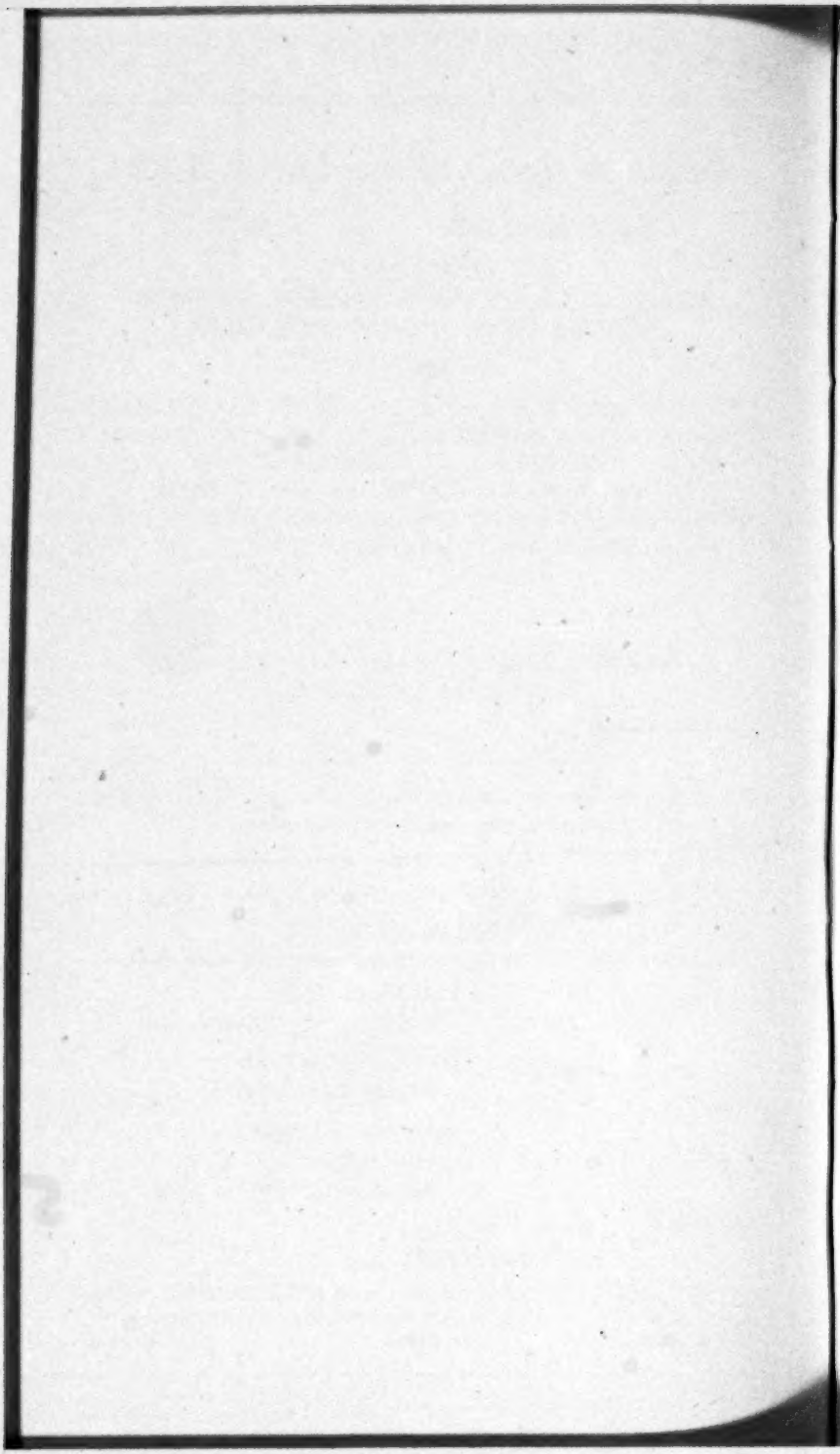

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INTEREST OF THE AMICUS

This brief is submitted on behalf of the City of Philadelphia, a Pennsylvania city of the first class with a population in excess of 1.9 million persons. Philadelphia has a public school population of 261,000 students, and an additional 142,000 students (54% of the public school population) attending nonpublic schools.[1] The brief is sponsored by City Solicitor Martin Weinberg, Esquire, its authorized law officer.

This brief is submitted by your *amicus*, City of Philadelphia, in order to impress upon your Honorable Court the urgency and gravity of the adverse effects of the decision of the court below, on the City of Philadelphia, its nearly 2 million inhabitants, especially, and also on their fellow citizens in Pennsylvania and the nation. Philadelphia respectfully urges this Court to accept jurisdiction and to receive written and oral arguments concerning the constitutionality of Act No. 92 of the Commonwealth of Pennsylvania approved August 27, 1971, 24 P.S. 5701 *et seq.*, known as the Pennsylvania Parent Reimbursement Act for Nonpublic Education.

---

[1] Attendance figures for school year ending June, 1972.

STATEMENT OF THE CASE

Pennsylvania Act No. 92 provides partial reimbursement to parents for tuition paid for the education of their children in nonpublic schools. The Act makes the following specific legislative findings of fact:

> ". . . (3) In the exercise of their constitutional right to choose nonpublic education for their children, parents who support such education make a major contribution to the public welfare. However, the immense impact of inflation, plus sharply rising costs of education, now combine to place in jeopardy the ability of such parents fully to carry this burden.
>
> (4) Should parents of children now enrolled in nonpublic schools be forced by economic circumstances to transfer any substantial number of their children to public schools, an enormous added financial, educational and administrative burden would be placed upon the public schools and upon the taxpayers of the State. Without allowance for inflationary increase, the annual operating cost of educating in public schools, the five hundred thousand students now enrolled in Pennsylvania's nonpublic schools would be an additional four hundred million dollars ($400,000,000). Necessarily added capital costs to construct new facilities or acquire existing facilities would be in excess of one billion dollars ($1,000,000,000). Any substantial portion of these operating and capital costs would be an intolerable public burden and present standards of public education would be seriously jeopardized. Therefore, parents who maintain students in nonpublic schools provide a vital service to the Commonwealth."

On July 21, 1972, a three-judge District Court in the Eastern District of Pennsylvania, declared the Act unconstitutional and issued an Order perpetually enjoining disbursements to parents under the Act.[2] As a direct con-

[2] *Lemon v. Sloan*, 346 F. Supp. 1356 (1972).

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sequence of this action by the District Court, payments exceeding $10,000,000 have been delayed to Philadelphia parents of nonpublic school children. Timely appeals have been filed on behalf of certain parents, parties below, and the Commonwealth of Pennsylvania. Jurisdictional statements were required to be filed as of October 20, 1972.

This Court has jurisdiction in the matter under 28 U.S.C. § 1253,[3] and the City of Philadelphia is adversely affected by the decision of the lower court in the following ways:

1. The "enormous added financial, educational and administrative burden" recognized by the Commonwealth in its legislative findings, *supra*, falls most heavily upon the City of Philadelphia, the largest urban center in the state. As such, the City is forced to contend with the concentrated and interrelated problems which characterize urban centers throughout the nation at this point in history. Pointing out that nonpublic school attendance is largely an urban phenomenon, the Report of the President's Commission on School Finance[4] declared:

> "One of every 10 American children attends a nonpublic school; the proportion is much higher in urban areas where the nonpublic school is a much more significant part of American education than it is in the Nation as a whole. Roughly 83 percent of all nonpublic school children are found in what are known as Standard Metropolitan Statistical Areas (the cities and their suburbs), and nearly half (47.5 percent) of all nonpublic children attend schools in center cities. Of the total elementary and secondary school enrollment in our 10 largest cities, 24.6 percent is found in nonpublic schools.

[3] Act of June 25, 1948 c. 646, 62 STAT. 928, 28 *U.S.C.A.* 1253.

[4] "Schools, People, and Money, The Need for Educational Reform," Final Report, President's Commission on School Finance, March 3, 1972, U.S. G.P.O. Stock No. 1780-0965, p. 54.

> It is apparent that nonpublic education is largely an urban phenomenon. Inner city nonpublic schools—mainly Roman Catholic, but also Lutheran in many areas—provide a substantial part of the total investment in urban education. And where their existence is threatened by financial and other problems, our cities must confront the prospect of assuming the additional burdens of educating nonpublic children."

The prospect facing the City of Philadelphia at the present moment is a stark one. The transfer of the City's nonpublic school children to the public schools would create a 54% increase in the student population of the public schools. The corresponding increase, expressed in dollars at 199,765,872 in public school operational expenditures alone, would be a staggering blow to the City's taxpayers.[5] These additional expenditures have been estimated for the current fiscal year at $12 million if 10% of the students transfer, and to $153 million if all transfer. The latter figure is projected at $215 million for fiscal year 1974-75.[6]

---

[5] The current operating budget for Philadelphia Public Schools is $369,936,800.

[6] In 1972, a nonsectarian committee composed of thirty leading citizens of the Philadelphia area, and representing business, labor, government, education and the community at large, published a voluminous report on the Financial Crisis of Catholic Schools in Philadelphia and Surrounding Counties. This report, popularly known as the "Gurash Report" after its Chairman, John T. Gurash, Board Chairman and Chief Executive Officer of the Insurance Company of North America Corporation, contains a vast amount of data concerning the financial crisis in Catholic and public education today. It is sufficient, for the limited purpose of this brief prior to consideration of the appellants' jurisdictional statement, to cite the following figures which indicate the estimated additional taxes which would be required to meet the additional operating costs which would have to be met by the public schools of Philadelphia reflecting varying rates of transfer of substantial numbers of nonpublic school children to the public schools. The figures have been estimated for the current and succeeding two fiscal years; rates of student transfer are expressed as percentages of the existing Philadelphia nonpublic school population, and the amounts involved reflect millions of dollars.

Fiscal Year	10%	25%	50%	100%
1972-73	$12 million	30	60	153
1973-74	26 million	60	115	175
1974-75	46 million	98	176	215

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2. Massive transfers of students from nonpublic to public schools would create educational chaos. Even if the huge financial problem could be solved, the public schools, already struggling under the effort to educate a quarter of a million students, and, in the process, turning out far too many functional illiterates, would find it impossible to supply the facilities and the trained personnel to provide adequate education, within a reasonable time to an additional 140,000 students. The inevitable effect will be substantial deterioration in the quality of education for all of the children of Philadelphia demanding a further investment of money and people of an incalculable amount.

3. A massive increase in taxes for educational purposes will produce extremely serious strains on the City's budget for all other municipal purposes. The City of Philadelphia, like the School District, (both of whom must look to the same base for their financial means) already faces major deficits in its operating budget. These deficits are the inevitable result of a diminishing base, which is itself due to the vicious circle of urban decay. Urban blight reduces the real estate tax base at the same time that the same blight, coupled with rising tax rates and a steady increase in crime, generates the flight of industry and affluent taxpayers from the City. These conditions, demanding greater and greater expenditures by the City, are also making the collection of the necessary funds more and more difficult. The action of the lower court, in striking down Act No. 92, a statute designed, *inter alia*, to prevent the addition of an "enormous burden" upon the taxpayers, if not reversed, will contribute immensely to this vicious circle.

4. The forced transfer of large numbers of children from nonpublic to public schools will result in incalculable damage to the entire community in terms of human rights and the public peace.

(a) The creation of a monolithic public school system will further depreciate the quality of education by eliminating the only effective competition which serves as a spur to educational achievement.

(b) Their student population swollen by the enforced addition of thousands of children whose parents believe in philosophical, theological and other ideological values differing substantially from those traditionally inculcated by the secular public schools, these public schools will be wracked with divisiveness by the efforts of each group to persuade or compel the school authorities to adopt educational policies consistent with each groups own deeply held values.

(c) The invalidation of Act No. 92 will strike down legislation designed to protect and encourage the constitutionally protected right of parents to control and direct the education of their children. The precious right of parents to choose the teachers to whom they will entrust an important part of that education will be severely restricted so that only the rich will be able to exercise this invaluable civil right, all others being forced to accept the educational philosophy offered by the state controlled schools. In Philadelphia, where under difficult financial conditions, the parents of 140,000 children are still able to exercise this right, the loss of this freedom by so many of its citizens, will be an incalculable human loss to which the City, its people and its government, cannot be indifferent.

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QUESTIONS

The following are a few of the highly significant questions which are raised by this case and which this Court will be asked to consider at the time for written and oral argument:

1. Whether it is a constitutionally proper legislative purpose for a state to provide public funds to enable a parent to exercise his constitutional right to choose the kind of education his child will receive, where the state finds that economic circumstances have otherwise effectively deprived persons of ordinary means, and to a greater degree the poor, of the practical ability to exercise this right of freedom of choice in education?

2. Whether the method employed by a state in a statutory plan to subsidize in part the tuition paid by a parent for the education of his children in other than public schools meets the requirements of the First Amendment, where the subsidy is paid directly to the parent and the governmental authorities administering the funds are forbidden by statute to undertake to regulate or control any aspect of the administration of any school selected by the parent?

3. Whether the presence or absence of any particular religious, philosophical or other ideological content in the curriculum of the nonpublic school (otherwise qualified under state law) chosen by the parent, may be taken into account by government in determining the right of a parent to receive assistance in the form of public funds to defray the expense of providing an education for his child?

4. Whether a citizen, believing himself aggrieved by the presence or absence of state legislation affecting his constitutional right to the free exercise of religion in the

selection of the kind of education he requires for his children, can be prohibited, under the terms of the First Amendment to the United States Constitution, from petitioning the state government for the enactment or repeal of legislation so as to provide for the redress of said grievance, where it appears likely that such petition will meet with strong opposition from other citizens who are of a contrary mind with respect to the merits of the proposed legislation or the validity of the grievance?

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DISCUSSION

In our Statement of the Case, *supra*, we have indicated some of the serious adverse effects which will occur if this Court affirms the decision of the court below.

The profound concern, felt by lawmakers and other citizens, for the survival of pluralism in education, and of the freedom of educational choice inherent therein, has been transformed into a state of alarm as a result of the recent decision of this Court affirming, without oral argument or the filing of briefs, and without opinion, the decision by a three-judge federal court in *Essex v. Wolman.*[7] Although there are a number of distinctions between the statute in *Essex* and our Act No. 92, the lower court's views in that case [8] reflect a disturbing retreat from the policy of "benevolent neutrality" established by prior well reasoned opinions of this Court,[9] and a definite acceptance of the exaggerated theory of "separation-of-church-and-state," in the absolute sense, which has never been adopted, but often specifically repudiated by this Court.[10] The essence of the *Essex* opinion, and of the opinion of the lower court in the instant case, is a strong tendency to emphasize the Establishment Clause at the expense of the Free Exercise Clause, thus substituting hostility for the required neutrality. If this hostile interpretation of the First Amendment is allowed to stand, the effect upon religious liberty and upon the concept of pluralism in American education will be disastrous.

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[7] No. 71-1664, decided October 10, 1972.

[8] 342 F. Supp. 399 (1972).

[9] See *Walz v. Tax Commission*, 397 U.S. 664, 669, 25 L. Ed. 2d 697 (1970) and cases cited; and see *Everson v. Board of Education*, 330 U.S. 1, 18 (1947).

[10] See *Walz, supra*, and *Zorach v. Clauson*, 343 U.S. 306, 96 L. Ed. 954 (1952).

The importance of pluralism in the American way has been well expressed by President Nixon in his message to the Congress [11] on March 3, 1970, when he declared:

> ". . . The non-public elementary and secondary schools in the United States have long been an integral part of the nation's educational establishment—supplementing in an important way the main task of our public school system. The nonpublic schools provide a diversity which our educational system would otherwise lack. They also give a spur of competition to the public schools—through which educational innovations come, both systems benefit, and progress results.
>
> Should any single school system—public or private—ever acquire a complete nonopoly over the education of our children, the absence of competition would neither be good for that school system nor good for the country. The non-public schools also give parents the opportunity to send their children to a school of their own choice, and of their own religious denomination. They offer a wider range of possibilities for education experimentation and special opportunities for minorities, especially Spanish-speaking Americans and black Americans. . . ."

And the value of pluralism as a safeguard for civil rights was recognized by "The Federalist" two centuries ago:

> "In a free government the security for civil rights must be the same as that for religious rights. It consists in the one case in the multiplicity of interests, and in the other in the multiplicity of sects." [12]

Nevertheless, although this Court has never formally adopted the hard line of hostility in church-state relations, its action in affirming the lower court in *Essex* has con-

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[11] Education Reform: The President's Message to the Congress Proposing a Series of Actions to Improve Elementary and Secondary Education, March 3, 1970. . . .

[12] Cited in *Douglas, William O.*, "Freedom of the Mind," Doubleday & Co., Inc., Garden City, N.Y. (1964).

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founded local and state lawmakers and given rise to deep concern respecting the line between prohibited and permitted forms of public aid for the education of children in schools of the parents' choice. Consequently, it is imperative, for the future of pluralism and educational freedom, and to dispel the divisive confusion generated by the *Essex* decision, that this Court provide full opportunity for a thorough examination of this crucial question by way of oral argument and the presentation of written briefs in the instant case.

It is extremely important, in any discussion of these matters, to distinguish between divisiveness and pluralism. Divisiveness is that state of hostility and conflict which arises, in the presence of differing beliefs, as a result of the unwillingness of some men to tolerate the coexistence, on the basis of equal rights, of other beliefs. Pluralism, on the other hand, is the condition which results when men of differing beliefs agree to live together in peace, on the basis of mutual respect and equal rights. Divisiveness seeks to have one view dominate while repressing those who differ; pluralism seeks to permit many views to exist, side by side, with none established as official, and all free to compete for the minds of men. Divisiveness is incompatible with the American constitutional principle; pluralism is an essential corollary of that principle.

It has been suggested [13] that the continuing effort by parents and other citizens to secure the allotment of a share of the public funds for the education of children in schools other than the public schools, introduces into our society a divisive element which creates bitterness and hostility and divides our people along religious lines to the detriment of civil peace. Consequently, it is argued, the courts must suppress all such efforts by striking down the legislative fruits thereof. Only thus, it is thought, can the unhappy conflict be eliminated; only when the participants

[13] See *obiter dicta* in *Lemon v. Kurtzman*, 403 U.S. 602, at p. 622 to 624, 29 L. Ed. 2d 745 at p. 761 and 762 (1971).

in the struggle (or, at least, those participants who press one side of the issue) become convinced that the continued effort to secure public funds is doomed to failure, will they be induced to cease their struggles, and the divisive conflict brought to an end.

The error inherent in this theory of judicial suppression of fundamental rights is that it assumes the acceptability, among a free people whose governments are founded upon the principle of freedom and justice for all, of the idea of governmental suppression of difference as a legitimate means for the achievement of unity and peace.

This assumption, that a free people, or a substantial portion of them, when faced with the suppression of deeply felt rights by judicial *fiat* or by any other exercise of governmental power, will meekly subside into quiet acquiescence, misreads the temper of parents in a democratic society intent upon the defense, at whatever cost, of their sacred right to select the teachers to whom they will entrust an important part of the education of their children. Denied effective recourse to the courts of justice, parents will transfer their efforts to other forums, and the battle will continue to rage, its bitter effects worsened, however, by the absence of the ameliorating effect of courts of law. Faced by the twin thrusts of spiraling costs and the denial of a fair share of tax funds, and forced thereby to abandon separate schools,[14] parents

[14] In the recent Message to the Congress from President Richard M. Nixon, On March 3, 1970, the President declared:

> "Up to now, we have failed to consider the consequences of declining enrollments in private elementary and secondary schools, most of them church supported, which educate 11% of all pupils—close to six million school children. *In the past two years, close to a thousand nonpublic elementary and secondary schools closed and most of their displaced students enrolled in local public schools.* "If most or all private schools were to close or turn public, the added burden on public funds by the end of the 1970's would exceed $4 billion per year in operations, with an estimated $5 billion more needed for facilities." (Emphasis supplied.)

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will transfer their struggle to the new arena, the monolithic public school, into which they will have been thus compelled to enroll their children. The school itself will become the new battleground, as each warring group, intent upon defending its own children from the imposition of alien theological, philosophical or other profound concepts of moral and spiritual value, seeks to persuade or coerce the school authorities to adopt educational policies and to select teachers whose fundamental values are consistent with each group's own deeply held values. The struggle for dominance, within the public schools, of one or another set of values, will continue to rage, with immense damage to the children and to the entire society, until one view shall have succeeded in suppressing all the others and in establishing itself as the one official set of values which shall be imposed upon all. This is neither freedom nor justice. It is rather the negation of those principles which motivated the founders of our country and moved them to adopt our Constitution, and especially, our Bill of Rights. The victor in such a struggle will become the established religion and the free exercise of religion will have ceased to be a significant element in the lives of our people.

The attempt to suppress differences by governmental *fiat* (whether by judicial or legislative action, or by the administrative action of the authorities who regulate the common schools), is guaranteed, among a people who still maintain the appetite for freedom, to produce the bitter conflict and hostility which the Founding Fathers strove to prevent when they adopted our Constitution and, especially, those first amendments which are known as the Bill of Rights.

SUMMARY

Pennsylvania's Parent Reimbursement Statute (Act No. 92 of 1971) is a statute carefully designed to secure the right of parents to choose the teachers of their children, in a fashion which avoids excessive entanglement between church and state; all in accord with the language of the United States Supreme Court as expressed in various decisions in which this Court has endeavored to balance the two constitutional principles of free exercise of religion and no establishment of religion; most recently in *Lemon v. Kurtzman, supra.*

In spite of all of this, in spite of the clear language of this Court, and despite the immense economic importance to the education of all of the children in Philadelphia and other great cities and other heavily populated areas, where heavy transfers, forced or otherwise, of students from non-public to public schools will create massive disruptions and insurmountable financial problems for already over-burdened taxpayers struggling to solve the present problems of public education and the mounting problems posed by rising crime and deteriorating housing and other urban problems—despite all of this, the lower court has ignored the plain intention of the legislature and the equally plain language of this Court and, by the simple process of exaggerating the concept of church-state separation, at the expense of religious freedom, has struck down this very carefully drawn legislation. Given the opportunity to present written and oral argument before this Court, your *amicus,* the City of Philadelphia, will show that the court below has seriously and badly misread the Constitution of the United States, the statute here in question, and the prior decisions of this court.

Unless this Court reverses the decision of the lower court, an extremely serious injustice will be perpetuated at

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the expense of hundreds of thousands of parents and children in Philadelphia, even more in Pennsylvania, as well as millions of others similarly situated throughout the country. The chilling effect which the closing of non-public schools would have upon the profoundly important civil rights of parents who would be thus deprived of their freedom of religion and of the mind through the demise of the heretofore Constitutionally protected right to choose the teachers of their children, will constitute a massive blow at human freedom and human dignity in America. The resulting economic burden which will be forced upon all of the taxpayers of Philadelphia and other areas of the country, by wholesale transfers of students to public schools, with the ensuing chaos, will create an immense barrier to effective education for all of the children of America.

CONCLUSION

For these reasons, your *amicus*, the City of Philadelphia, respectfully urges your Honorable Court to note probable jurisdiction and to set the matter down for oral argument at the next available list.

Respectfully submitted,

/s/ James L. J. Pié
Deputy City Solicitor

/s/ Joseph J. Carlin
Deputy City Solicitor

/s/ Martin Weinberg
City Solicitor

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IN THE

Supreme Court of the United States

October Term, 1972.

No. 72-459.

GRACE SLOAN, as State Treasurer of the Commonwealth of Pennsylvania,

and

JOSE DIAZ and ENILDA DIAZ, His Wife, WILLIAM ZIMMERSPITZ and NANCY ZIMMERSPITZ, His Wife, F. CARL KRETZMANN and KATHERYN L. KRETZMANN, His Wife, ARTHUR HARVEY and MURIEL HARVEY, His Wife, DANIEL F. X. POWELL and ANNA T. POWELL, His Wife, SETH W. WATSON, JR., and ANNE P. WATSON, His Wife, and HENRY R. CROUTER,

Appellants,

v.

ALTON J. LEMON, NEAL P. BRACKEN, and BENJAMIN S. LOWENSTEIN,

Appellees.

On Appeal From the United States District Court for the Eastern District of Pennsylvania.

BRIEF OF APPELLANTS JOSE DIAZ AND ENILDA DIAZ, HIS WIFE, WILLIAM ZIMMERSPITZ AND NANCY ZIMMERSPITZ, HIS WIFE, F. CARL KRETZMANN AND KATHERYN L. KRETZMANN, HIS WIFE, ARTHUR HARVEY AND MURIEL HARVEY, HIS WIFE, DANIEL F. X. POWELL AND ANNA T. POWELL, HIS WIFE, SETH W. WATSON, JR., AND ANNE P. WATSON, HIS WIFE.

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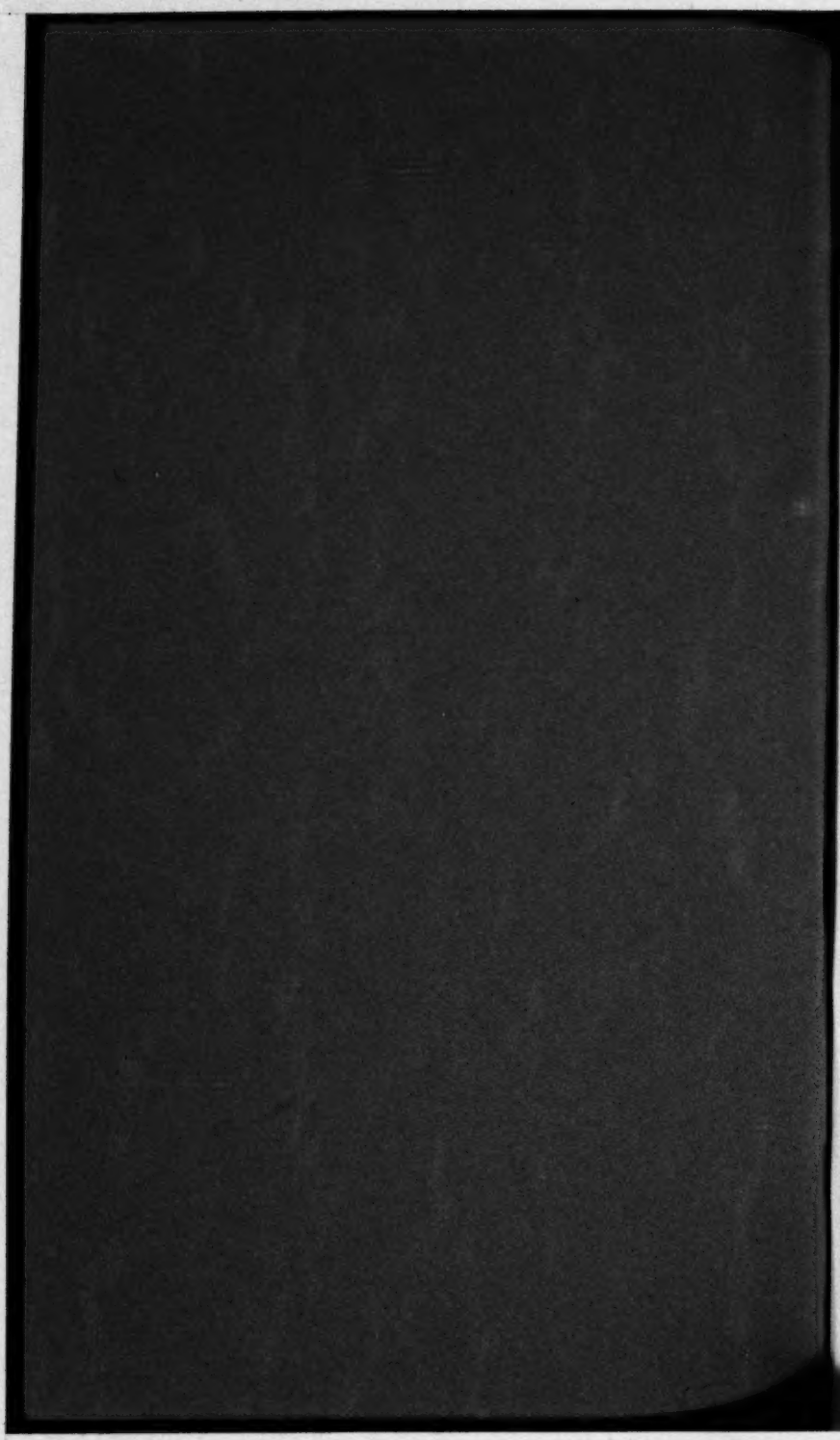

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972.

No. 72-459.

GRACE SLOAN, AS STATE TREASURER OF THE COMMONWEALTH OF PENNSYLVANIA,

AND

JOSE DIAZ AND ENILDA DIAZ, HIS WIFE, WILLIAM ZIMMERSPITZ AND NANCY ZIMMERSPITZ, HIS WIFE, F. CARL KRETZMANN AND KATHERYN L. KRETZMANN, HIS WIFE, ARTHUR HARVEY AND MURIEL HARVEY, HIS WIFE, DANIEL F. X. POWELL AND ANNA T. POWELL, HIS WIFE, SETH W. WATSON, JR., AND ANNE P. WATSON, HIS WIFE, AND HENRY E. CROUTER,

Appellants,

v.

ALTON J. LEMON, NEAL F. BRACKEN, AND BENJAMIN S. LOWENSTEIN,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

BRIEF OF APPELLANTS JOSE DIAZ AND ENILDA DIAZ, HIS WIFE, WILLIAM ZIMMERSPITZ AND NANCY ZIMMERSPITZ, HIS WIFE, F. CARL KRETZMANN AND KATHERYN L. KRETZMANN, HIS WIFE, ARTHUR HARVEY AND MURIEL HARVEY, HIS WIFE, DANIEL F. X. POWELL AND ANNA T. POWELL, HIS WIFE, SETH W. WATSON, JR. AND ANNE P. WATSON, HIS WIFE.

OPINION BELOW.

The only Opinion of the three-judge District Court for the Eastern District of Pennsylvania in this case was entered on April 6, 1972, prior to joinder of issue by Answer in the case, and as the basis for denial of motions to dismiss made by Appellants (Defendants below). The District Court's Order of July 21, 1972, recites said Order (disposing of a later Motion for Summary Judgment) to be in accordance with that Opinion (A 87). The Opinion is reported in 346 F. Supp. 1356 (1972) (A 37-A 63).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

Constitution of the United States, amendment XIV:

"No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

Constitution of the United States, amendment I:

"Congress shall make no law respecting an establishment of religion . . ."

Pennsylvania Parent Reimbursement Act for Nonpublic Education, August 27, 1971, P. L. —, No. 92, Pa. Stat. Ann. Tit. 24 § 5701, *et seq.*

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QUESTIONS PRESENTED.

The Act provides that the parent of a child who has completed the preceding school year in a nonpublic school in which the requirements of the compulsory school attendance law and of Title VI of the federal Civil Rights Act of 1964 are met, and for whom the parent paid tuition, shall be entitled to receive a reimbursement payment limited to $75.00 (if the attendance was in an elementary school) or $150.00 (if attendance was in a secondary school), or the actual amount of tuition paid, whichever is lesser. This payment to the parent is not earmarked for any school and may be used by the parent unrestrictedly, in any way that he desires, whether for education, family maintenance or otherwise. It becomes private funds, his own money.

1. Does this Act have a primary effect that advances religion?

2. Does the denial of the benefits of the Act to a parent who had paid tuition for a child enrolled in a nonpublic *non-religiously affiliated* school deny such parent the equal protection of the laws?

3. Does the denial of the benefits of the Act to a parent who had paid tuition for a child enrolled in a nonpublic *religiously affiliated* school deny such parent the equal protection of the laws?

STATEMENT OF THE CASE.

1. The Statute Involved.

Act 92 of 1971 provides that the state shall make payments to any parent who had paid tuition, for the already completed school year, for the education of a child in a nonpublic school. The Act covers parents of children in both nondenominational and denominational schools and makes no distinction between such parents. The specified payments are not payments of tuition and are in no way related to the tuition scales of different schools. The payments are not required by the statute to be paid over to any school or devoted to educational uses: the parent receives them unearmarked and without any attached condition as to their disposition. They become his money and are no longer public funds. The student must have been enrolled in a school wherein the requirements of the compulsory attendance law may be fulfilled and which meets the requirements of Title VI of the U. S. Civil Rights Act of 1964.

In accordance with the Act, the Pennsylvania Parent Assistance Authority reimburses the parent on the basis of the parent's verification that he had paid tuition for the past school year for a child enrolled in a nonpublic school as defined in the Act (Section 6). The Act specifically precludes the Authority from exercising any "direction, supervision or control over the policy determinations, personnel, curriculum, program of instruction or any other aspect of the administration or operation of any nonpublic school or schools." (Section 4).

In Section 2 the Pennsylvania General Assembly stated its purpose in enacting Act 92:

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". . . in order to reimburse parents partially for this service so vitally needed by the Commonwealth, and in order to foster educational opportunity for all children . . ."

The word "service", refers back to the concluding sentence of subparagraph (4) of Section 2:

"Therefore, parents who maintain students in nonpublic schools provide a vital service to the Commonwealth."

The premises upon which that conclusion rests are set forth in legislative findings contained in the four subsections of Section 2:

1. Parents who send their children to nonpublic schools assist the State in reducing the rising costs of public education.
2. The welfare of the Commonwealth requires that children be assured ample opportunity to develop their intellectual capacities.
3. Inflation and rising educational cost now imperil the ability of parents to continue to support nonpublic education.
4. Any substantial transfer of nonpublic school children to public schools in Pennsylvania will entail an intolerable public financial burden and seriously jeopardize present standards of public education.

Act 92 as a bill in the legislature, was known as House Bill 1379. The bill, with 67 sponsors, passed both the House and the Senate with comfortable majorities.[1] It was signed into law by the Governor on August 27, 1971.

1. H. 1379 passed the House by a vote of 132 to 63. It was then amended in the Senate (to change the percent of tax revenue in Section 5 from 25% to 23%) and passed as amended by a vote of 36 to 12. The bill was then returned to the House for concurrence where it passed by a vote of 173 to 16.

2. The Proceedings Below.

On September 13, 1971, the Appellees (the Plaintiffs below) brought this action, naming the State Treasurer as defendant. The Complaint alleged that the Act violates the Establishment, Free Exercise and Equal Protection Clauses of the Constitution and sought an injunction against the paying of any funds pursuant to the Act.

Thereafter, twelve parents, having children enrolled in nonpublic schools in Pennsylvania, moved under Rule 24(a) for intervention of right as parties defendant, stating that, by virtue of being prime beneficiaries of the Act, they had an interest in the subject of the action distinct from that of the named party defendant, the State Treasurer. Ten of these parents had paid tuition for their children enrolled in nonpublic schools which are church-related, while two of the parents, Seth W. Watson, Jr. and Anne P. Watson, his wife, had paid tuition for their child who attends a nonsectarian, nonpublic school. The District Court granted the parents' Rule 24(a) motion[2] (A 29-A 31).

All parties defendant then moved, under Rule 12(b)(6), to dismiss the Complaint for failure to state a claim upon which relief can be granted. The District Court, on April 6, 1972, issued an Order that the motion to dismiss be denied (A 56). Although at this point no Answer had been filed, nor any motion for judgment by plaintiffs, the Order was accompanied by an Opinion declaring the Act unconstitutional under the Establishment Clause. That is the only Opinion which has been rendered in the case. Its contents are discussed *infra*.

On April 28, 1972, the Court granted motions of the defendants to dismiss those counts of the Complaint relat-

2. The separate intervention of a parent, Henry E. Crouter, was likewise granted.

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ing to the Free Exercise and Equal Protection Clauses (A 64). On the same date the defendant Grace Sloan, State Treasurer, filed her Answer to the Complaint (A 65-A 67). On May 1, 1972, the parent intervener defendants Jose Diaz, *et al.*, filed their Answer to the Complaint, stating that to deny any intervener defendants the benefits of the Act solely because their children attend nonpublic church-related schools, or to deny any intervener defendants the benefits of the Act solely because their children attend nonpublic non-church related schools, would be to deny such intervener defendants the equal protection of the laws (A 68-A 73).

The intervener defendants Seth W. Watson, Jr. and Anne P. Watson, his wife, on May 3, 1972, moved for summary judgment. Their motion was supported by an affidavit which disclosed that they are eligible to receive payments under the Act and are parents of a child who is enrolled in a nonpublic non-church related school (A 77-A 79).

The court, on June 20, 1972, denied this motion without oral argument on the ground that "the plaintiffs seek no relief against the interveners Seth W. Watson, Jr., and Anne P. Watson, his wife." (A 84). In the same Order the court requested oral argument on the question of whether the Act "can properly be viewed as containing a separable provision for aid to parents of children attending nonpublic schools that are not church related." (A 84-A 85). The plaintiffs also moved for summary judgment on May 3, 1972 (A 80-A 83).

On July 21, 1972, the District Court granted that motion, "it appearing that more than 90% of the children attending nonpublic schools in the Commonwealth of Pennsylvania are enrolled in schools that are controlled by religious organizations or that have the purpose of propagating and promoting religious faith. . ." (A 87).

The intervener defendants Jose Diaz, *et al.*, on July 31, 1972, moved that the judgment be amended on the ground that there was no evidence in the record to support the Court's foregoing statement and, further, on the ground that the Act does not direct or earmark the payment of any funds, directly or indirectly, to any schools, nonpublic or public (A 90-A 91). On August 4, 1972, the Court denied that motion (A 92).

Thus, although its Opinion of April 6, 1972, was rendered prior to the Answer of the parent interveners which raised Equal Protection claims, the court below never issued a subsequent opinion addressing itself to those claims.

Furthermore, after ruling on the Motions to Dismiss, and denying the Motion for Summary Judgment by Seth W. and Anne P. Watson, and the court having asked for argument on the issue of whether the Act was severable in its application to them, the court, nevertheless, omitted to render any opinion respecting that issue.

The Opinion of the District Court states that the Supreme Court has developed three tests for determining whether a particular program offends the Establishment Clause: (1) whether the statute has a "secular legislative purpose", (2) whether "its principal or primary effect [is] one that neither advances nor inhibits religion", and (3) whether the statute fosters "an excessive government entanglement with religion." (A 42). The District Court found that Act 92 passed the first test (A 43). The Court did not apply or discuss the third test. The Court said that the Act violates the Establishment Clause for the following reasons:

1. ". . . the effect of the Act is to aid the schools and therefore the failure of the state to insure that the funds

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are restricted to secular education or general welfare services renders the Act unconstitutional." (A 51-A 52).

2. ". . . even if we held that the Act does not aid sectarian schools, we must still conclude that the Act supports religion because it aids parents in providing a religious education for their children." (A 34).

SUMMARY OF ARGUMENT.

Act 92 of 1971 was enacted to provide assistance to a broad class of Pennsylvania citizens who bear exceptional burdens in a growingly socialized society. These citizens are parents who have been supporting the private (including religious) education of their children.

Twelve such parents are appellants before this Court. They are caught between the pressures of a three-sided vise: legal compulsion, conscience compulsion, and economic compulsion.

The compulsory attendance laws require them—under criminal penalty—to send their children to schools.

Their consciences command them, in pursuit of intellectual good or moral goals, to choose schools other than schools provided by the state. For many parents this is a religious duty, as fully mandatory, as completely unavoidable, as the duty imposed by the state's attendance statutes.

Virtually all parents are obligated—under criminal penalty—to pay public school taxes and other taxes for public education. But parents are likewise the main source of support of nonpublic schools. The costs both of living and of schooling are constantly rising; taxation of individuals is a subject of nationwide protest. For most parents today, the burden of paying for public education, while at the same time paying for the education of their children in schools chosen according to dictates of conscience, is a heavy burden, rapidly becoming impossible for them to carry.

In recent years, the Pennsylvania legislature has tried to find a way out for the numerous citizens who have found themselves in such a position. In 1968 it took the "purchase of service" concept which it had for decades successfully utilized in relation to hospitals and child care institutions (both sectarian and nonsectarian) and applied this to non-

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public schools. This Court, in *Lemon v. Kurtzman*, 403 U. S. 602 (1971) struck that program down, so far as religious schools were concerned, saying that it created excessive entanglements between church and state. For those who had the most vital and intimate interest in the outcome of that case—parents—the loss of the benefits of that act was serious. Still in pursuit of a constitutional means to aid this large sector of the public, the General Assembly thereafter enacted Act 92, the legislation here challenged.

The Act provides that the Commonwealth shall make stated payments (out of non-education funds) to any parent, who had paid tuition, for the already completed school year, for the education of a child in a nonpublic school. The payment is without conditions attached. Nothing in the Act requires or implies that the parent hand it over to any school, that he spend it on education, that he spend it on anything. The money becomes his. It is plainly a form of state assistance to persons whom the legislature, in its sound judgment, recognized as bearing special burdens and having, as a class, special need. The Act involves *no* relationships—"entangling" or otherwise—between the state and schools.

The District Court, however, has held that Act 92 is a law respecting an establishment of religion, on the ground that (according to the court) it has a "primary effect which advances religion". The court reached that conclusion by saying (1) that the Act is really a "subsidy" to religious schools and (2) that "a possible and quite likely use of the aid . . . is to enable parents to continue to pay tuition at sectarian schools." Thus the court has put the "primary effect" label on a vague and novel test of its own devising.

Act 92 has no primary effect which advances religion. It awards no subsidy to any school. It pays no tuition to any school, directly or indirectly.

Furthermore, the District Court's ruling plainly denies the appellant parents the equal protection of the laws. It is intended to be applied to parents whose children attend nonsectarian schools as well as to parents whose children attend sectarian schools. To read the nonsectarian school parents out of the Act without basis, as did the court below, is to classify them arbitrarily and to their substantial detriment—a classification whose invidious character is only made more obvious by the fact that the court considered them minority beneficiaries.

The court below also denies equal protection to the appellant parents whose children attend religiously affiliated schools. Act 92 provides a public welfare benefit in the form of payments to parents who fall within a rationally based class of persons. It undoubtedly also provides breathing room for them in the exercise of constitutional freedoms in educating their children. The court below says that a parent must be excluded from participation in this public welfare benefit solely on the grounds that (a) in the previous school year, he chose to have his child fulfill the Compulsory Attendance Law through enrollment in a religiously affiliated school and paid tuition therefor, and (b) it is "possible and quite likely" that he will expend his benefit payment under the Act for tuition in such a school. The court has thus wrongfully classified these latter parents also. According to its rule, if it be shown that a parent has exercised, or may yet exercise, a choice of a state-approved religiously affiliated school for his child—which choice is nothing other than an exercise of religious conscience—that parent must be disqualified from participating in the public welfare benefit which he otherwise (upon surrender of his conscientious choice) would enjoy. Such a classification, on account of religious views, is fully as abhorrent as classifications on account of race, lineage or alienage.

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ARGUMENT.

I. ACT 92 IS NOT A LAW RESPECTING AN ESTABLISHMENT OF RELIGION.

A. The Act Has a Secular Legislative Purpose.

The court below correctly stated the three tests under the Establishment Clause, which this legislation would have to meet, relating, respectively, to "secular legislative purpose", "primary effect that neither advances nor inhibits religion", and excessive "government entanglement with religion." It concluded that "the Act expresses a legitimate secular objective consistent with the Establishment Clause." (A 43). And see *United States v. O'Brien,* 391 U. S. 367, 383-385 (1968) and Frankfurter, *Some Reflections on the Reading of Statutes,* 47 Col. L. Rev. 527, 529 (1947).

B. The Act Has No Primary Effect Which Advances Religion.

The Court found Act 92 to fail the "primary effect" test. This the court did, first, by saying that the Act provides, in effect, a subsidy to sectarian schools unrestricted to secular objectives, and secondly, that it "encourages" parents to send their children to church-related schools because a "possible and quite likely" use of the payments by the parents will be "to continue to pay tuition at sectarian schools."

Act 92 cannot be read to spell out a school subsidy. Its reference to schools, school children, education and educational cost do not render it an act subsidizing schools. Anyone familiar with family economics in Pennsylvania at the present hour, realizes that the cost, due to taxation and inflation, of educating children, is a major cost to most parents in the state. But to parents who respond to un-

deniable commands of conscience by educating their children in sectarian and other nonpublic schools, this cost is particularly burdensome.

Act 92, although affording assistance to parents of extremely low income, does not limit its benefits to these. Its aim is to provide meaningful relief[3] in the face of the economic problem which the General Assembly carefully described in its findings:

> "(3) In the exercise of their constitutional right to choose nonpublic education for their children, parents who support such education make a major contribution to the public welfare. *However, the immense impact of inflation, plus sharply rising costs of education, now combine to place in jeopardy the ability of such parents fully to carry this burden.*" (Emphasis supplied.)

The extreme impact of inflation is particularly visible in the Consumer Price Index. For the Philadelphia Area the annual average (on all items) has moved from 90.1 for 1962 to 127.0 for 1972. While between 1962 and 1967 this was an increase of 9.9 points, for the next five years the increase has been 27 points. This runs very close to the U. S. city average. U. S. Department of Labor, Bureau of Labor Statistics, *Consumer Price Index For Urban Wage Earners and Clerical Workers* (1973). As the individual's cost of living has mounted, so has his tax burden. Most Pennsylvanians now pay a federal income tax, a state income tax, local per capita taxes, a sales tax, and various special taxes. The public school tax in Pennsylvania has *more than doubled* in the past decade, as has the average per pupil

3. Act 92 may also be seen in the light of the evident need, in a growingly socialized society, for the making by government of allowances to individuals to enable them to enjoy options in pursuit of personal goals of human freedom and human dignity.

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cost. Pennsylvania Department of Education, *Statistical Report of the Secretary of Education for the School Year Ending June 30, 1971,* Tables 59, 65 (1972). If education which is 100% publicly funded has thus increased in cost, it is not surprising that a burden of a similarly escalated cost has had to be borne by supporters of private education.

The legislature, in devising this piece of social legislation, could well take into account the foregoing factors, and expressly note them, in writing a provision for family or parental economic relief, without at the same time creating, directly or indirectly, any school subsidy. The aim, in statutory construction, "is to save and not to destroy." *NLRB v. Jones & Laughlin Steel Corp.,* 301 U. S. 1, 30 (1937). The legislative finding and declaration of policy must and can be read so as to preserve the Act.

The court below defined what it said was "the issue" in this case—not any question of "unrestricted grants" to schools, but something quite different:

> "The issue before this court is whether *individuals* may receive state funds *solely because they have paid tuition at a church-related school.*" (A 50, Footnote 7. Emphasis supplied.)

The court developed its discussion of this with the following reasoning (A 51, *et seq.*):

1. Parents (out of their own pockets and not with public funds) pay tuition to church-related schools.
2. Tuitions are the "very life blood" of private educational institutions.
3. Under Act 92, the state makes payments to parents who have paid tuitions at church-related schools.
4. Therefore, the state provides such schools their "very life blood".

5. Therefore, Act 92 has a primary effect which advances religion and is unconstitutional under the Establishment Clause.

As can be seen, certain linkages must be assumed before those five statements can be coupled together. A fatal *non sequitur* is found as between No. 3 and No. 4. To get from No. 3 to No. 4, the court would have to have established that Act 92 requires a parent to hand the payment over to a church-related school, or that the parent would not have exercised his free choice of a nonpublic school but for the tuition reimbursement. But no provision of the Act, directly or by implication, imposes such a requirement, or even a requirement that the parent devote the payment to any educational use. The payments to the parent are unearmarked, and they are *ex post facto* the choice of a qualified school for secular education under the compulsory attendance laws. Since the payment to the parent comes under his unrestricted power of disposition and control, it has become *his* money, and is no longer public money.

There is no subsidy, direct or indirect. No tuitions are paid under this Act. No "voucher" system is set up. No parent is a "conduit", irrevocably committed to later making payment to a school. Thus the Court's entire discussion of *Almond v. Day*, 197 Va. 419 (1955), *Hartness v. Patterson*, 179 S. E. 2d 907 (S. Carolina 1971), etc. and the whole topic of tuition payments is not relevant (A 53-A 54). Further, no school may assert a claim for any money under the Act. What a particular private school may hope for, it may or may not receive. That will be up to the parent—who may change to a different private school, change to a public school, move from the area, pay no tuition because his child has graduated or for any other reason that suits him. All-knowing imaginings and cocksure presuppositions concerning the "parochial" schools and the

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citizenry who have historically supported them cannot supply what the legislature left out of Act 92: one comma of legal right in any school to one cent of funds under the Act. If the parent is a "conduit", let it be asked: what provision of what law would give what school standing to enforce (and against whom) a claim for the "tuition"? But to raise the question is to reveal the total baselessness of the District Court's facile charge of "subsidy".

The lower court well recognized the difficulty of attempting to establish Act 92 as providing a subsidy to sectarian schools, or a tuition earmarked for them. It could not, of course, say that parents *will, in fact,* send their children to sectarian schools due to the payments. So it dealt with the point by saying that they *might.* To resolve the question of whether the Act has any necessary primary effect of advancing religion, the court turned to deemed probabilities, here saying that in *Tilton v. Richardson,* 403 U. S. 672 (1971), the Supreme Court had

> ". . . found the *possibility* of such [religious] use enough to strike down the provision of the statute which permitted the unrestricted use of the building after twenty years. It is clear that a *possible and quite likely use* of the aid under review is to enable parents to continue to pay tuition at sectarian schools." (A 53. Emphasis supplied.)

Thus the lower court has interposed a new test (never in fact pronounced by the Supreme Court) for laws respecting an establishment of religion. The Supreme Court has never held any law invalid on the principle that in incidentally conforms to a citizen's religion preference. *McGowan v. Maryland,* 366 U. S. 420, 442 (1961); *Walz v. Tax Commission,* 397 U. S. 664, 673 (1970). If that were so, laws providing for tax exemption of churches would be

invalid. If that were so, the compulsory attendance laws of all fifty states would be invalid; for it is by virtue of such accommodating laws that six million children in the United States may legally attend parochial schools. If that were so, the following statements of this Court in *Walz v. Tax Commission,* 397 U. S. 664, 671 (1970) must now be deemed repudiated:

> "Surely, bus transportation and police protection to pupils who receive religious instruction *'aid'* that particular religion to maintain schools that plainly tend to assure future adherents to a particular faith by having control of their total education at an early age." *Walz, supra,* at 671. (Emphasis supplied.)
>
> "*'When the state encourages religious instruction . . . it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to our spiritual needs.'*" *Id.* at 672. (Emphasis by the Court.)

This Court said, in *Lemon v. Kurtzman,* 403 U. S. 602, 612 (1971) that "the three evils against which the Establishment Clause was intended to afford protection . . ." are "sponsorship, financial support, and active involvement of the sovereign in religious activity." Neither sponsorship, financial support, or active involvent of the state in religious activity are provided by Act 92.

Nor can any rule of "possible and quite likely" serve as a constitutional standard for deciding that an admittedly secularly motivated enactment of a state is a law respecting an establishment of religion. The parent can indeed pay over to a church money which he received under any other social welfare program as well as under the Act. In that respect he differs in no wise from a recipient of public assistance in Pennsylvania, who likewise may pay over to a church the earmarked assistance which he receives.

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The District Court's use of this Court's decision in *Tilton v. Richardson* calls for correction. The facts of *Tilton* were that buildings were constructed on sectarian college campuses at public expense and under state restrictions limiting their use to secular functions. The Supreme Court struck down that part of the legislation in question which limited the government's power of recapture of the capital grant to a twenty year period for violation of those restrictions. Unlike the provision considered in *Tilton*, the funds under Act 92 are not consigned to sectarian schools.

The District Court likewise invents erroneous "primary effect" doctrine in its following innovation:

> "Finally, in order for a court to conclude that a statute has the constitutionally impermissible effect of advancing religion, *the court is not required to conclude that the scheme of assistance will necessarily aid religion; the court can conclude that the statute has the effect of advancing religion if the terms of the statute fail to preclude a possible use of government funds to promote religious exercises.*" (A 49. Emphasis supplied.)

The court thus says that a statute may advance religion without aiding religion. It implies, further, that practically all legislation in the United States may be declared unconstitutional, whether related to schools, railroads, parents, or the national forests, since, on the court's premises, *all* enactments can be declared to advance religion. We cite this passage from the court's opinion, not to cavil, but because its extravagance further illustrates the lack of due process accorded to the parents and this legislation throughout the proceedings below (See pp. 6-8, *supra*).

Finally, the Order of the court below of July 21, 1972 (A 87) recites that it grants plaintiffs' motion for summary judgment upon consideration of the record, briefs and argu-

ments, and "it appearing that more than 90% of the children attending nonpublic schools in the Commonwealth of Pennsylvania are enrolled in schools that are controlled by religious organizations or that have the purpose of propagating and promoting religious faith." There is no record foundation for the figure 90%, nor has any witness, document, or admission been placed in the record to give substance and meaning to the words "controlled", "religious organizations", "propagating and promoting", or "religious faith".

Act 92 does not create any religious preference. It deals with parents, not with schools or denominations.

The test of nonpreference of religion is to be found in the fairness and neutrality of classification in a statute's coverage. See *Walz v. Tax Commission, supra,* at 669. Thus in *Walz,* the fact that the economic relief from tax exemption redounded to greater savings to those religions which owned churches of far greater value than the majority of sects did not, in law, amount to an unconstitutional preference for any religion. Similarly in *Board of Education v. Allen,* 392 U. S. 236 (1968), the Court could well assume that Catholic school students would, by reason of their predominant numbers, receive the major portion of the statutory benefit. In *Sherbert v. Verner,* 374 U. S. 398, 409 (1963), this Court flatly rejected the contention that the exemption of Seventh Day Adventists from unemployment compensation laws would be a preference for their religion by the state, so as to constitute an establishment of religion. Absent any invidious facial discrimination among denominational and nondenominational school students, the claim of preference of religion is clearly without foundation in the law.[4]

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4. It is of interest to note that our national policy has been generous in appropriating huge amounts of funds—taken from all taxpayers—to achieve public needs abroad, even where such appropriations have constituted direct financial support to governments

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The reasoning of the court below, upon which it concludes that Act 92 has a primary effect that advances religion, plainly has no foundation in our traditions and in decisions of the Supreme Court.

C. The Act Does Not Give Rise to Excessive Government Entanglement With Religion.

The court below did not hold that Act 92 calls for, or would lead to, any entangling relationships between religion and the state. Act 92 creates no administrative or supervisory relationships whatever between the state and nonpublic schools. Rather, the Act explicitly prohibits such relationships. It provides, in Section 4, that the Parent Assistance Authority

> ". . . shall exercise no direction, supervision, or control over the policy determinations, personnel, curriculum, program of instruction or any other aspect of the administration or operation of any nonpublic school or schools."[5]

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4. (Cont'd.)

(*e.g.*, the Moslem nations, Israel, Great Britain, Spain) whose constitutions, statutes or known official public policy formally recognize, prefer, or support a single religion. See comment of Mr. Justice Douglas in *Kurtzman, supra*, 631. Such aid has also included direct money subsidy to religious elementary and secondary schools. Among many examples of such granting have been appropriations under the Foreign Assistance Act, under which various educational institutions, including rabbinical schools, in Israel have been subsidized. See Public Law 90-249, Jan. 2, 1968, 81 Stat. 936; Report No. 91-603, Senate Committee on Foreign Relations, Dec. 10, 1969, 23. Moslem and other sectarian institutions have been similarly financed. Foreign aid statutes, treaties and executive orders—no less than domestic legislation—are controlled by constitutional limitations. *Reid v. Covert*, 354 U. S. 1, 16 (1957). See also Henkin, *The Constitution, Treaties and International Human Rights*, 116 U. Pa. L. Rev. 1012, 1015-1020 (1968).

5. The sole possible contact between the state and the schools, under the Act, is one in which the Pennsylvania Assistance Authority, under the powers granted it in Section 8, may seek to determine the

The Supreme Court, in *Lemon*, cited approvingly its own prior decision in *Board of Education v. Allen*, 392 U. S. 236 (1968). As the record in *Allen* shows, the New York program there upheld by the Court involved fairly extensive administrative relationships and state controls. The Court was careful to point that out. *Id.* at 239, 245-246. Furthermore, the New York program called for substantial state expenditures in support of secular educational programs conducted by sectarian schools. Yet the Court did not view the New York program as one which involved any "excessive entanglement" between government and sectarian schools.

Unlike the New York program, Act 92 does not provide for any administrative relationships between the state and schools, nor the transfer from the state to the schools of money or property. Thus "the factor that distinguishes" both *Allen* and *Everson v. Board of Education*, 330 U. S. 1 (1947) from the program struck down in *Lemon* is vitally present in Act 92 as its essential characteristic: the state aid is "provided *to the student and his parents—not to the church-related school.*"

Finally, the appellant parents refer to two related recent decisions. Appellees' Motion to Dismiss or Affirm moved the Supreme Court to dismiss the appeal or to affirm the judgment of the court below on the sole ground that the questions herein presented have been rendered insubstantial by the decision of *Wolman v. Essex*, 342 F. Supp. 339 (E. D. Ohio), *aff'd.* — U. S. —, 34 L. Ed. 2d 69 (1972). The Memorandum For The United States As *Amicus Curiae*, 10, 11, well points out factors which distinguish both the stat-

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5. (Cont'd.)
accuracy of a statement submitted by a *parent* in connection with reimbursement. That contact involves no administration, inspection, surveillance, auditing or control by the state of any school. If the parent has made a false statement, no school can in any way be affected by any action of the state under the Act.

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utes and the cases coming, respectively, from Ohio and Pennsylvania. The appellant parents note, in particular, the following conclusion presented in the Memorandum:

> "The Ohio statute invalidated in *Essex* is different from the Pennsylvania statute in at least one significant respect. The Ohio statute required substantial involvement by both the State Board of Education and the State Legislature in fixing the total amount the state would provide for tuition reimbursement. J. S. No. 71-1664, pp. 18-20, 50-51. The statute thus directly posed the danger of the 'successive and very likely permanent annual appropriations that benefit relatively few religious groups' which concerned the Court in *Lemon v. Kurtzman*, 403 U. S. at 623.
>
> "The Pennsylvania statute, on the other hand, avoids that problem, since it provides that 23 percent of the total receipts from the state cigarette tax will be paid into the parent reimbursement fund from which the tutition reimbursement payments are to be made. If the amount thus generated for the fund is insufficient to pay the $75 and $150 reimbursements, their amount is to be reduced *pro tanto* (J. S. 24a-25a). There will accordingly be no occasion for further legislative involvement or political debate once the program is placed in operation. Cf. *Tilton v. Richardson*, 403 U. S. at 688." *Id.* at 11.

On October 20, 1972, the decision in *Committee for Public Education v. Cherry*, 350 F. Supp. 655 (S. D., N. Y., 1972) invalidated several sections of an act which amended the New York Education Law so as to provide for, *inter alia*, direct grants of money to nonpublic schools for maintenance and repair of buildings, as well as reimbursement of tuition to parents with family incomes of less than $5,000

per annum. This program is administered by the Commissioner of Education. The court held that, since the parent described in the Act is in an extremely low income bracket, it was "the very assumption of the Legislature that he will use the money grant for tuition." The court therefore concluded that the parent was "simply a conduit" for public funds. The court at the same time correctly stated:

> "While . . . there is a distinction between a grant to the family and a grant to the parochial school, there is no such distinction where the parent is a mere conduit for a payment of tuition. In the former, the costs assumed by the State were generally borne by the parents, in the first instance, and it is they who are being reimbursed, not the school. In the case of tuition, it is the school which benefits by getting tuitions from State funds which it might otherwise not receive." *Id.* at 668.

This distinction is precisely observed in Act 92, under which, as has been seen, the parent cannot be legally identified as a "conduit". Not acknowledging the correctness of the judgment of the court in *Cherry*, it is nevertheless important to point out that Act 92 is distinguishable from the New York statute in important respects. While the New York statute amends the New York Education Law, is administered by the Commission of Education, is financed out of public school funds, and is interlocked with statutory provisions for grants to schools for their maintenance, the Pennsylvania statute is an independent enactment, not a part of the Pennsylvania School Code or other educational statute. It is administered by an independent authority. It uses no moneys derived from the school tax. In the instant case, as contrasted with *Cherry*, no party has asserted Free Exercise claims, and the parent appellants Diaz, *et al.*, have not asserted (and do not believe) that the constitutionality of

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the legislation depends upon the economic benefit it may confer upon the state by preventing the demise of nonpublic schools.

For all of the foregoing reasons, it is submitted that Act 92 is not a law respecting an establishment of religion.

II. DENIAL OF THE BENEFITS OF THE ACT TO A PARENT WHO HAD PAID TUITION FOR A CHILD ENROLLED IN A *NON-RELIGIOUSLY* AFFILIATED SCHOOL DENIES TO SUCH PARENT THE EQUAL PROTECTION OF THE LAWS.

Two of the parent appellants, Seth W. Watson, Jr., and Anne P. Watson, his wife, paid tuition for their child, Ellen P. Watson, to a nonpublic nonsectarian school and are otherwise eligible as statutory beneficiaries of the Act (A 78). Following intervention granted by the court, they moved for summary judgment (A 77). The court below denied their motion on the stated ground that the plaintiffs had sought no relief against them.[6] The court thereafter, by its Order of July 21, 1972, granted the plaintiffs' motion for summary judgment and enjoined the payment of funds under the Act to parents of children attending *any* nonpublic schools (A 87). These rulings clearly deny to Seth W. Watson, Jr., and Anne P. Watson, the equal protection of the laws.

A. The Court's Denial of Fair Procedural Due Process.

Having recognized the Watsons as parties, the District Court denied them procedural due process. Obviously, the court below is completely in error in its reasoning that the motion of these parents must be denied, "it appearing

6. "*It appearing that the plaintiffs seek no relief against the intervenors* SETH W. WATSON, JR. and ANNE P. WATSON, his wife, the motion for summary judgment of said intervenors is DENIED without oral argument." (A 84).

that the plaintiffs seek no relief against [them]." Mr. and Mrs. Watson were granted intervention by the court on January 19, 1972, "as parties defendant pursuant to Rule 24(a) . . . the Stipulation of counsel indicating no objection to the granting of the motion, and it appearing to the Court that the Intervenors claim an interest relating to the property which is the subject of this action and are so situated that the disposition of this action may as a practical matter impair or impede their ability to protect that interest." (A 29-A 30). The fact that the plaintiffs had not initially chosen to make Mr. and Mrs. Watson defendants can have no remote bearing upon whether or not, once the court had made them defendants, their motion for summary judgment should have been denied.

B. Failure of the Court to Follow State Law on a State Question.

1. The Watsons Are Intended Statutory Beneficiaries.

The District Court has refused to apply state law in what is admittedly a state question. It is clearly in error in its subsequent denial (as provided for in its Order of July 21, 1972) of the benefits of the Act to the Watsons. The Act (Section 3(1)) defines "parent" as follows:

> "(1) 'Parent' means a resident of the Commonwealth of Pennsylvania who is a parent of a child enrolled in a nonpublic school or a person standing in loco parentis to such child."

The Act (Section 3(2)) defines "nonpublic school":

> "(2) 'Nonpublic school' means any school, other than a public school, within the Commonwealth of Pennsylvania, wherein a resident of the Common-

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> wealth may legally fulfill the compulsory school attendance requirements of law and which meets the requirements of Title VI of the Civil Rights Act of 1964 (Public Law 88-352)."

Mr. and Mrs. Watson are "parents" within that definition. Further, they are eligible for the benefits of the Act within the statutory terms (A 78-A 79). The fact that their child attends a *nonsectarian* school certainly cannot disqualify them under the Act, since the Act does not limit its benefits to parents whose children attend sectarian schools. Rather, it employs the term "*nonpublic* school". The Watson parents had paid a tuition for a child of theirs who attended just such a school. The court below appears to reason that Act 92 was intended mainly for parents whose children attend sectarian schools, and that, therefore, the Watson parents were not intended beneficiaries. Such reasoning does the most obvious violence to the inescapably clear language of the Act. If the General Assembly had desired to say "sectarian", it could and would have done so. In its all too evident haste to condemn Act 92 (see pp. 6-8, *supra*), the court below missed the Pennsylvania reality, that there are real life citizens of that state whose children are enrolled in non-religious private schools. Substantial numbers of such parents have applied for benefits under the Act. To deny them these benefits, on the ground that their children attend nonsectarian schools, or on the ground that children of other parents in the class attend sectarian schools, is a palpable violation of the equal protection principle. This gratuitous denial is vividly pointed up by the fact that the plaintiffs, in their complaint, did not seek to block benefits to parents of nonsectarian school pupils (A 10) and so stated in their oral argument.

2. The Court's Failure to Give Effect to the Severability Clause.

Finally, even under the court's erroneous view that the Act calls for an illegal subsidy to sectarian schools, the Watson parents, whose child attends a nonsectarian school, can in no way be affected. Payment to them of the benefits of the Act, under such erroneous view, could raise an Establishment Clause issue only if the Act were not severable in its application. The Watsons do not question the principle that, where the statutory text constitutes an interwoven, inseparable whole, invalidity of some provisions may so taint the rest as to require a declaration that the whole statute is invalid. Pennsylvania Statutory Construction Act, Act of May 28, 1937, P. L. 1019, art. III, § 55, 46 Pa. Stat. Ann. § 555. That principle does not, however, control the question of applications of statutes. *Olin Mathieson Chemical Corporation v. Cohen*, 234 F. Supp. 80, 84 (E. D., Pa. 1964). Act 92 contains a severability clause which is not the typical severability clause, but instead is one in which the General Assembly dealt expressly with *different applications*. Section 10 thereof contains the following provision:

> "If a part of this act is invalid, in one or more of its *applications*, the part remains in effect in all valid *applications* that are severable from the invalid *applications*." (Emphasis supplied.)

C. The Court's Cumulative Errors Result in a Denial of Equal Protection to the Watson Parents.

The District Court's position is apparently that, because a majority of the beneficiaries of the Act assumedly will be parents of children attending sectarian schools, there can be no valid *applications* of the Act to the remaining beneficiary parents irrespective of the facts (a) that

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these other parents are expressly intended beneficiaries, (b) that the claims of these other beneficiaries cannot remotely be tainted with Establishment Clause objection and (c) that the legislature expressly intended and provided that these beneficiaries be granted payments irrespective of the status of any other parent beneficiaries. This position, again, does violence to the plain language of the statute and unconstitutionally deprives the Watsons of their rights.

The application of the statute, being a state rather than a federal question, the action of the court below seems all the more arbitrary and unfounded.

What is more, the court below says that the Watsons are persons belonging to a *minority* of statutory beneficiaries (A 87). This fact, if true, but accentuates the denial to them of the equal protection of the laws.

III. DENIAL OF THE BENEFITS OF THE ACT TO A PARENT WHO HAD PAID TUITION FOR A CHILD ENROLLED IN A *RELIGIOUSLY AFFILIATED* SCHOOL DENIES TO SUCH PARENT THE EQUAL PROTECTION OF THE LAWS.

A. The District Court's Avoidance of the Issue.

As has been seen, if the District Court had followed the law, it would have to have approved the granting of the benefits of the Act to the Watsons, who had paid tuition for their child at a non-religiously affiliated school. That court already had, however, on April 6, 1972, announced that Act 92 was unconstitutional (A 38). That was even before joinder of issue in the case, the Answer of the parent interveners being (timely) filed only on May 1, 1972 (A 68). That was before the District Court knew, or could have known, what any defendant might desire to raise in his Answer. The parents' Answers raised affirmative defenses of Equal Protection.

Conceivably, this placed the court in a dilemma—and not merely one pertaining to the precipitate character of its action of April 6th. A deeper problem may have been how, in light of its already having flatly stated that the Act was unconstitutional, to deal with the Equal Protection claims. But any weighing and discussing of those claims would have revealed not only that the Watsons were clearly entitled to the benefits of the Act, but that if the other parents were to be excluded from benefits, that could only be on the basis of their expression (through antecedent payment of tuition) of personal preference for a different kind of nonpublic state-approved school—a religiously affiliated school. The court avoided encounter with all of the problems which such a distinction would obviously raise by denying, without oral argument, the Watsons' motion for summary judgment (A 84) and then (in granting plaintiff's motion for summary judgment) lumping *all* the parents together and denying *all* of them the benefits of the Act (A 87).

This appeal opens up those issues which the District Court had thus sought to avoid.

B. The District Court's Classification Is Unreasonable.

The District Court has denied payments, under Act 92, to parents who had antecedently paid tuition, out of their own money, to religiously affiliated schools. This denial was on the basis of the court's belief that it is "possible and quite likely" that those parents will, in the future, due to the availability of benefits under the Act, make further payments, out of their own money, to such schools. In other words, what the court takes to be an indicated preference for such schools, among beneficiaries of general multi-purpose welfare legislation, is sufficient, in its eyes, to disqualify them from being its beneficiaries. As has

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been seen, the court also used this same factor to disqualify the Watsons; the court uttered not one word as to why the Watsons should be disqualified *except that their interests were appended to the "religious interests" of the "90%"* (A 87). In light of that fact, and since the court erred in excluding the Watsons as beneficiaries, the legal status of the twelve parents is seen as follows:

> 1. The Watsons express a preference for a nonpublic Pennsylvania school in which the state says the requirements of the Compulsory School Attendance Law are met, and which meets the requirements of Title VI of the Civil Rights Act, and which is nonreligiously affiliated. They may receive the benefits of the Act.
>
> 2. The Diaz, Zimmerspitz, Kretzmann, Harvey and Powell parents express a preference for a nonpublic Pennsylvania school in which the state says the requirements of the Compulsory School Attendance Law are met, and which meets the requirements of Title VI of the Civil Rights Act, and which is religiously affiliated. They are denied the benefits of the Act.

This is plainly a classification which denies the latter the equal protection of the laws.

State action[7] may not survive an equal protection attack where the classification is not "rationally related to the achievement of a legitimate state goal." *Dandridge v. Williams,* 397 U. S. 471, 475 (1970). The District Court did not point to any state goal and say that its achievement was the basis for its classification. In fact, with full opportunity to do so, it chose not to mention the matter of classification which the parents had so precisely raised.

---

7. The action of the court below is "state action". *Shelley v. Kraemer,* 334 U. S. 1, 14 (1948).

If it be guessed that the District Court impliedly pointed to prevention of an Establishment of Religion as the "legitimate state goal" which it sought by its decision to achieve, consideration of the Establishment Clause cannot be the end of the inquiry where competing constitutional protections are presented.

The Supreme Court has long recognized that the Establishment Clause, though cast in absolute terms, may, if carried to a logical extreme, conflict with other constitutional protections. *Everson v. Board of Education,* 330 U. S. 1, 18 (1947); *Zorach v. Clauson,* 343 U. S. 300, 314 (1952); *Board of Education v. Allen,* 392 U. S. 236, 242-243 (1968); *Walz v. Tax Commission,* 397 U. S. 664, 665-669 (1970); *Lemon v. Kurtzman,* 403 U. S. 602, 614 (1971). Just as Establishment claims may encounter tension with, and find limitation in, Free Exercise claims, it similarly must be deemed limited by the prohibitions of the Equal Protection Clause.

Act 92 is designed as welfare legislation which takes into account the cost of education to parents and to the state, but here, as in *Allen,* there has been shown "nothing about the necessary effects of the statute that is contrary to its stated purpose." *Allen, supra,* at 243. The court below was unable to show that the "necessary effects" of the statute are contrary to its stated purpose which that court agreed was neutral and secular. It nonetheless has sought to classify the parents out of the statute by using as its standard of classification the vague and arbitrary norm that a "possible and quite likely use of the aid . . . is to enable parents to continue to pay tuition at sectarian schools." (A 53).

The appellant parents have not asserted a constitutional right to payments from the state so that they may obey commands of religious conscience. *Cf., Brusca v.*

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State of Missouri ex rel. State Board of Education, 332 F. Supp. 275, *aff'd.,* memorandum decision, — U. S. —, 92 S. Ct. 1493 (1972); *Committee for Public Education v. Cherry, supra.* Rather, they assert, with the Supreme Court in *Everson,* that the state

> ". . . cannot *exclude* individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Nonbelievers, Presbyterians, or the members of any other faith, *because of their faith or lack of it,* from receiving the benefits of public welfare legislation." *Everson, supra,* at 16. (Emphasis supplied to word, "exclude".)

The District Court, by its action has excluded, as a group, the individual parent appellants, Diaz, Zimmerspitz, Kretzmann, Harvey and Powell, from the benefits of Act 92, on the ground that the statute would encourage them to perform an act of conscience and will, which, by any definition, would be "because of their faith"—namely, pay a tuition to a school chosen for their child out of religious interest and desire.

But as race and alienage may not be employed as standards for discrimination, neither may religion. *Oyler v. Boles,* 368 U. S. 448, 456 (1968). *To hold that an individual must be cut off from welfare benefits aimed at a class to which he plainly belongs, on the ground that these benefits may, to some extent, serve to accommodate his preference for a religious education for his child, is as much an offense to the principles of Equal Protection and of government neutrality towards religion as it is a gross caricature of the principle of Nonestablishment.*

CONCLUSION.

In view of the foregoing, it is submitted that the District Court was in error in concluding that Act 92 is unconstitutional, and that its judgment should be reversed.

Respectfully submitted,

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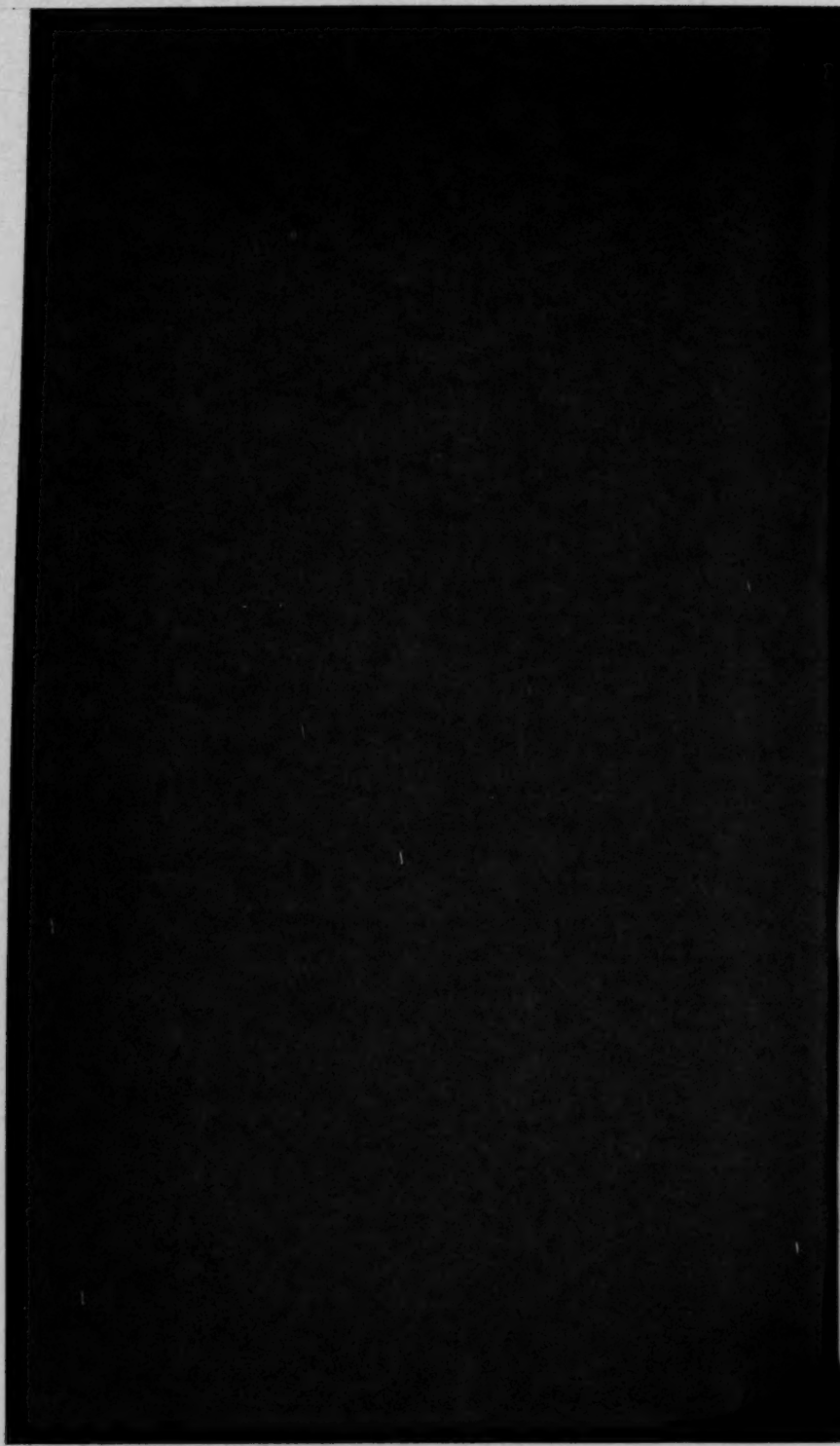

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INTRODUCTION

I. The factual setting

ralism Education.

In the next few months, this Court will be called upon to make historic decisions in the areas of state aid to nonpublic education, the outcome of which will critically affect the course of all public and private education for the balance of this century; and which will finally determine whether—and to what extent—the several states may constitutionally use public funds to preserve and reinforce this country's historic commitment to pluralism in education.

Scope of n-Catholic pport.

Although Catholic Church interests may to date have been the most vocal and visible in focusing attention on the plight of nonpublic eduction, particularly at the secondary level, this should not overshadow the fact that many diverse groups are concerned with the survival of this nation's pluralistic system of nonpublic education. These groups include all segments of private and independent secondary school interests—both sectarian and nonsectarian,—governmental agencies and elected representatives charged with furnishing free public education, and lay leaders in business, finance, labor and professional circles who have accurately appraised the financial crisis facing nonpublic education today.[1]

---

1. See the report of the blue ribbon committee of civic and business leaders on the financial crisis of the parochial school system in one major urban area, Philadelphia, and the catastrophic effect of its collapse on the already near-bankrupt School District of Philadelphia, *The Report of the Archdiocesan Advisory Committee on the Financial Crisis of Catholic Schools in Philadelphia and Surrounding Counties*, (John T. Gurash, Chairman, Philadelphia, 1972), a copy of which was attached to the brief of Intervenor-Defendant, Pennsylvania Association of Independent Schools, in the second appeal in *Lemon v. Kurtzman*, No. 71-1470, heard by this Court in the October Term, 1972. See also Exhibit B, section 3, pp. 55-59 herein.

Furthermore, there are in Pennsylvania, as elsewhere in the country, a host of sectarian schools, in addition to Catholic ones, that are encompassed by the term "nonpublic" schools. They are as varied as the wide range of our ethnic and religious heritage, including such religious groups as the Society of Friends (Quakers), Lutheran, Presbyterian, Episcopalian, Methodist, Jewish, and many others.

This broad based support for aid to nonpublic education is specifically evidenced by the variety of agencies and organizations which, in this Pennsylvania case alone, have filed amicus or supporting briefs urging the Court to uphold the Pennsylvania Parent Reimbursement Act:

¶ The Office of the Solicitor General of the United States of America—on behalf of the Executive Branch of the United States Government.

¶ The City of Philadelphia in its own right and on behalf of the financially beleaguered School District of the City of Philadelphia.

¶ The National Association of Independent Schools.[2]

¶ The Pennsylvania Association of Independent Schools.[3]

---

2. The National Association of Independent Schools, Inc. ("NAIS") is a Massachusetts corporation whose membership comprises approximately 768 independent schools engaged in primary and secondary education in 43 states of the United States, including 56 schools in the Commonwealth of Pennsylvania. Its membership also includes 27 regional school associations, one of which is the Pennsylvania Association of Independent Schools (see footnote 3, *infra*).

3. The Pennsylvania Association of Independent Schools ("PAIS") is a non-profit corporation organized and existing under the laws of Pennsylvania as an association concerned with the interests of its member schools in elementary and secondary education in this Commonwealth.

Its membership consists of 94 elementary and secondary schools, both private and church related, located throughout the Commonwealth, and for all practical purposes it represents almost all of the independent schools in this state.

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¶ The Benjamin Banneker Free School—a predominantly black secular school in a ghetto area of Philadelphia. (See the amicus brief filed in the Court below, a copy of which is attached hereto as Exhibit A).

Contribution of independent education.

While the number of pupils enrolled in private or independent schools is significantly less than the number in the Catholic parochial system, the independent schools have made and continue to make an extraordinary contribution to the national interest by educating large numbers of high quality, highly motivated leaders in business, the professions and public service.[4]

Scholarship program.

Furthermore, these independent schools have received widespread and well deserved public recognition for their scholarship programs, particularly to disadvantaged black students.[5]

All PAIS member schools admit all qualified students without regard to race, color, creed, or national origin.

All elementary and secondary member schools of the Association are accredited either by the Pennsylvania Association of Private Academic Schools or by the Middle States Association of Colleges and Secondary Schools and as such qualify to furnish education to Pennsylvania students under the provisions of the Pennsylvania Compulsory School Attendance Law.

PAIS was a party in interest in *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

4. See Lxhibit B, *infra*.

5. "*Minority Group Survey—1971 and 1972*" published by NAIS. During the academic year of 1971-72, a survey was sent to all members of NAIS. 730 responded to this survey (or 95.8%) and stated that they have open enrollment policies (100% responded yes).

1) Number of minority students for the academic year 1971-72.

1. 9,627 blacks, an increase of 26.3% over the year 1969-70, and a 158% increase over the last 6 years.

2. Total number of minority students was 12,977, or 5.5% of the total enrollment in the schools.

2) Total financial aid given to students (with the exception of aid to faculty children) was $29,416,455.00. The total number of students receiving aid was 25,292, or 10% of all the students.

However, without some form of continuing public assistance, these scholarship programs, except in a handful of elite, heavily endowed private secondary schools, will inevitably collapse. Moreover and more tragically, many financially hard-pressed schools will also disappear, and when this happens we will have lost a priceless heritage that can never be regained.

The harsh fact the Court and society as a whole must recognize is that today, nonpublic education just cannot survive without substantial public assistance (—either in some form of aid to parents such as tax credit or tuition reimbursement, or to the schools themselves for non-ideological purposes—) because of the present pressure of inflation and competition from the ever-spiraling costs of teachers' salaries and benefits in the public school system. These costs continue to escalate in our public schools, due in large measure to the highly organized teacher groups and unions,[6] many of whom also vigorously oppose aid to nonpublic education.[7]

Note 5—*Continued*

3) Scholarships for minority students: $9,766,875.00 was given for financial aid, or 33.2% of the total amount of financial aid given. The number of minority students receiving aid was 5,830 students, or 23% of all scholarship students.

4) 1 out of 10 students receive aid, but 50% of minority students receive aid.

6. Some of these groups have shown that they will go to almost any extreme to gain their desired goals, including, as we have witnessed in Philadelphia, an open and notorious flouting of the law by the Union leadership and rank and file of Philadelphia Federation of Teachers who refused to obey a court injunction enjoining a crippling eight week strike in the public schools. Meanwhile, two of their leaders were jailed for contempt of court and each day hundreds of school teachers were arrested for violating a court order enjoining mass picketing and violence.

7. See, for instance, *Federal Support of Public Education*, Resolution C 21—Adopted in July 1972 by legislation specifically of the National Education Association, an independent, voluntary organization available to all professional teachers:

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II. Background of the legal setting

Finally, by way of introduction, we think it may be helpful to put the legal issues affecting the many forms of aid to nonpublic education in proper historical perspective, as this Court begins to focus in the weeks and months ahead on such critical issues as the validity of public funds for:

¶ *Mandated Services*—i.e., Testing, record keeping, etc. *Arthur Levitt et al. v. Committee for Public Education and Religious Liberty* (October Term, 1972, Nos. 72-269, 72-270, 72-271).

¶ *Non-Ideological Aid*—such as health and safety grants for repair and maintenance of nonpublic schools in certified low income areas. *Nyquist et al. v. Committee for Public Education and Religious Liberty* (October Term, 1972, Nos. 72-791 and 72-753).

"The National Education Association seeks general federal support for the whole of public elementary and secondary education. It believes that federal monies must be expended solely for public education. It seeks federal support in line with the following principles:

A. The federal share of the costs of public elementary and secondary education must be at least one-third.

B. Federal funds must be allocated without federal control for expenditure and be sub-allocated by state education agencies.

C. The amount of aid must be generally predictable for long range planning and specifically predictable for year to year planning.

D. Present programs of specific aid must be expanded and improved by consolidation and simplification of administration.

E. Public funded services for non-public school students must be strictly limited to medical and dental care, public welfare programs, school lunch and milk programs, and public safety services such as fire and police protection, which are budgeted and administered through the appropriate public agency.

F. Federal legislation must comply with civil rights statutes, be consistent with the constitutional provision

¶ *Partial Tuition Reimbursement to Parents*—either by:

(i) direct payment to parents for a portion of tuition incurred. *Sloan v. Lemon, Crouter v. Lemon* (October Term, 1972, Nos. 72-429 and 72-620).

(ii) tax credit for tuition payments. *Nyquist v. Committee for Public Education and Religious Liberty* (October Term, 1972, Nos. 72-694, 72-753, 72-791 and 72-929).

Any discussion of the legal principles involved must also focus on the critical issues that the various Justices have felt are persuasive or controlling in their final decisions on whether those who challenge state programs have met their heavy burden of establishing that the act complained of violates any one of the three-fold tests which this Court has laid down in order for a state program to be declared unconstitutional:

¶ that the primary *purpose* of the legislation is to advance religion; or

¶ that the primary *effect* advances religion; or

¶ that the statutory scheme involves undue entanglement between church and state.

Note 7—*(Continued)*

respecting an establishment of religion, and provide for judicial review as to its constitutionality.

The Association will oppose any bill which includes provisions in federal legislation to provide funds, goods, or services related to the instructional process for nonpublic school students."

On the other hand, the City of Philadelphia on its own behalf and on behalf of the School District of Philadelphia favors aid to nonpublic education and has requested reversal of the lower court's decision in this case. See Brief of the City of Philadelphia, Amicus Curiae filed on the jurisdictional issue in No. 72-459.

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1) *The critical factual issues*

Those factors which the Justices have felt are important in deciding the validity of grants or benefits to institutions, which include religious bodies, are:

¶ *Direct Payment*—whether the funds are paid directly to the institution? Or whether the institution is benefited only indirectly, as for example, by being relieved of an obligation to pay taxes?

¶ *Ideological Purposes*—whether if funds are paid directly to the institution, these funds are used for educational content, which may require policing to preserve secularity of use?—or whether they are used for non-ideological purposes?—such as loans or grants, for bricks and mortar, and for physical facilities such as dormitories, gymnasiums, etc.

¶ *Permeation*—whether it is possible to separate religion from education?—or whether the one so permeates the other as to bar absolutely any form of public aid to private education?

¶ *Higher v. Secondary Education*—whether a different result obtains when funds are paid directly to institutions of higher education?—as opposed to direct grants to secondary schools?

¶ *Entanglement—Administrative and Legislative*

(a) *Administrative entanglement*—i.e., whether when aid is paid directly to the institutions involved, the policing of the institutions' use of the funds constitutes undue entanglement between church and state?

(b) *Legislative entanglement* — whether, when funds are paid directly to schools, does lobbying for continuing legislative appropriations create such a potential for devisiveness along religious lines as to violate the First Amendment?

What, then, has been the interplay of these factors discussed above in the recent decisions of this Court and the Opinions of the Justices involving Church and State issues?

2) *The legal issues—recent cases involving church/state relations*

a) **Walz v. Tax Commission,** 397 U.S. 664 (1970).

In *Walz v. Tax Commission, et al.*, all of the Justices, except for Mr. Justice Douglas, who dissented, agreed—(Justices Brennan and Harlan filed separate concurring opinions)—that a tax exemption from state or local taxes for church property did not offend the Constitution. In so holding, the Court clearly delineated between *direct payments* to an institution—and the *indirect benefits* enjoyed by religious institutions from state action which does not constitute direct aid for the advancement of religion. In so doing, the Court pointed out that any form of direct payments to religious institutions were fraught with entanglement problems between church and state—a concept that was further developed and applied to strike down the Pennsylvania Purchase of Secular Educational Services Act in *Lemon v. Kurtzman*, discussed below.

b) **Tilton v. Richardson,** 403 U.S. 672 (1971).

In *Tilton*, the Court rejected a constitutional attack on the use of public funds, paid directly to institutions, including religious schools—where the funds were expended for buildings and facilities used exclusively for secular purposes.

Four members of the Court, Mr. Chief Justice Burger and Justices Harlan, Stewart, and Blackmun, rejected the "permeation" argument discussed below—and upheld direct payments to (1) institutions of higher learning, (2) where the funds were for self-policing, non-ideological purposes such as buildings not used for religious purposes.

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Three members of the Court, Justices Black, Douglas, and Marshall, dissented on the grounds of "permeation"—i.e., that in any educational institution which is sponsored, affiliated, or controlled by any religious group, religion so permeates secular education that one cannot be separated from the other—and that *any* direct payment to any such institution must be barred absolutely. Mr. Justice Brennan dissented on the grounds, *inter alia*, that aid to such institutions benefits both their educational and religious functions.[8]

Mr. Justice White concurred in the judgment but disagreed with what he felt was an unjustified distinction between higher and secondary education, concluding that the case should be remanded for further proceedings to determine whether the recipient institutions were bona fide sectarian institutions.

c) **Early et al. v. DiCenso,** Nos. 70-569, 570 decided *sub nom* Lemon v. Kurtzman, 403 U.S. 602 (1971).

In *DiCenso*, Mr. Chief Justice Burger, speaking for the Court, (Justices Douglas, Black, and Marshall joined in the opinion of the Court and concurred separately, Mr. Justice Brennan filed a separate opinion, and Mr. Justice White dissented) held that a Rhode Island statute, so structured as to provide salary supplements paid directly to teachers in *only* Catholic parochial schools, violated the Establishment Clause.

Mr. Justice White, in his dissent, criticized the majority for holding the act unconstitutional on its face in light of the lower court's explicit finding of fact that the teachers had not mixed religious and secular education. He also dissented from application of the entanglement doctrine.

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8. His opinion considered as well the *DiCenso* and *Lemon* cases discussed immediately below.

d) **Lemon v. Kurtzman,** 403 U.S. 602 (1971).

In *Lemon v. Kurtzman*, Mr. Chief Justice Burger, writing for the Court, (with Justices Douglas and Black also concurring separately and Justices Brennan and White writing separate opinions) struck down the Pennsylvania Purchase of Services Act, under which public funds were paid directly to nonpublic schools,—religious and secular,—in return for contractual obligations by the schools to teach certain non-religious subjects, such as mathematics, foreign languages, etc. The Court's decision was based solely on entanglement, and let stand, in the face of vigorous opposition from the appellants attacking the Act, the lower court's finding that neither the primary purpose nor the primary effect was to advance religion—but rather that it was for a proper secular purpose—to aid education.

Mr. Justice White concurred in the judgment but dissented from the facial attack on the Pennsylvania Act, believing that the case should be remanded to give plaintiffs an opportunity to prove their charge of permeation.

3) *The common predominant threads of agreement*

Hopefully, in the remaining seven cases to be heard this spring, this Court is now approaching what will be the last round in the relentless efforts of diverse plaintiffs through their common counsel to thwart, on constitutional grounds, the will of the people as expressed by their state legislatures to preserve pluralism in education. As these cases draw to a close, several predominant threads consistently appear in the recent decisions and opinions by the members of the Court:

¶ Five Justices, Mr. Chief Justice Burger and Justices Harlan, Stewart, White and Blackmun, have consistently rejected the concept of "permeation," which has been equally consistently adhered to by Justices Black, Douglas, and Marshall.

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¶ These same five Justices have also agreed that direct payments to institutions, religious or otherwise, for non-ideological purposes, are not unconstitutional on their face; whereas the same three mentioned above have held otherwise, relying principally on application of the doctrine of "permeation;" and Mr. Justice Brennan has also held otherwise, because aid to an institution benefits both its secular and religious functions.

¶ All but Mr. Justice Douglas have agreed that there is a basic difference between a *direct* payment to an institution and an *indirect* benefit conferred by the state, which may benefit a religious institution, but does not constitute advancement of religion. See *Walz v. Tax Commission, supra.*

¶ Finally, no Justice has ever said, nor has any Opinion of this Court ever held, that any of the questions of fact discussed above, that are clearly applicable to a direct payment to an institution or school, have any relevance whatsoever when applied to a grant to an individual, i.e., a parent.

As developed in the brief that follows, when the funds are paid to individual parents, or credited against their taxes, these parents, and they alone, control whether any portion thereof will ever be paid to religious or secular schools.

As individuals, parents have the same basic constitutional rights that plaintiffs so zealously profess to protect—i.e., to make their own free choice on how to educate their children and, in particular, to be free from inquiry as to the religious practices or absence of same at the school which they, in their sole discretion, choose for their children.

Thus, when funds are paid to parents, this precludes, because of constitutional grounds, any inquiry as to how these funds are spent; and, of necessity, precludes any determination that the funds go to any religious schools or that the primary effect of the payments constitutes advancement of religion by the state.

The fundamental difference between payment directly to a school and payment to a parent has been eloquently and succinctly stated by the National Association of Independent Schools in their amicus brief filed with this Court on the jurisdictional issue:

> "To say, as some critics do—and without a shred of evidence to support it—that the parent acts as a mere conduit to the school, is to denigrate the very stuff of which this country's greatness was made and to undermine the rock upon which our Constitution and Bill of Rights is grounded—personal freedom and the right of each individual to make his own free choice.
>
> Where the parent is the recipient of state aid, he alone decides how and where the funds are applied and thus effectively cuts off state control or participation, thereby enabling the state to aid its legitimate interests in secular education, and at the same time, to preserve, in the words of the Chief Justice, the spirit of 'benevolent neutrality' which will neither advance nor inhibit religion.
>
> This is in the best tradition of a country that treasures its private institutions and the freedom and rights of individuals. Far from offending the Constitution, tuition aid to parents supports and reinforces the very principles the Constitution was designed to protect."

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OPINION BELOW

Plaintiffs below filed suit in the Eastern District of Pennsylvania to enjoin enforcement of Act 92 of August 27, 1971, known as the Parent Reimbursement Act, which provides for partial tuition reimbursement to parents of children attending nonpublic schools meeting the State's requirement for compulsory education. On April 6, 1972, the three-judge district court rendered its opinion, denying the motions to dismiss filed by appellant Henry E. Crouter, a parent of children enrolled in nonpublic schools, and the other appellants (defendants below). After answers were filed, the district court by order of July 21, 1972, granted plaintiff's Motion for Summary Judgment on the opinion of April 6, 1972, and perpetually enjoined Grace Sloan, State Treasurer of the Commonwealth of Pennsylvania and her successors in office from paying out any funds of the Commonwealth of Pennsylvania pursuant to said Act 92. The opinion of the lower court is reported in 346 F. Supp. 1356 (1972) and is in the joint Appendix to Nos. 72-620 and 72-459 at pages 37a *et seq.*[9]

JURISDICTION

This action to enjoin enforcement of a Pennsylvania Statute as unconstitutional was brought under 28 U.S.C. §§1331, 1343(3), 2201 and 2202 and was heard by a three-judge court pursuant to 28 U.S.C. §2284. The final decree of the three-judge court was entered on July 21, 1972; Notice of Appeal was filed in the District Court by Appellant Crouter on August 21, 1972. The appeal was docketed on October 20, 1972, and this Court noted probable jurisdiction on January 22, 1973.

The jurisdiction of the United States Supreme Court to review this decision by direct appeal is conferred by

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9. References to the joint Appendix are henceforth designated A. 1a, etc.

Title 28 U.S.C. §1253. That jurisdiction is sustained by the decisions of this Court in *Briggs v. Elliott*, 342 U.S. 350 (1952) and *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

STATUTE AND CONSTITUTIONAL AMENDMENT INVOLVED

The Statute involved is the Pennsylvania Parent Reimbursement Act for Nonpublic Education, Act 92 of the Laws of Pennsylvania, 1971, P.L. — (the "Act"), the full text of which appears at A. 56a *et seq.*

The Act authorizes reimbursement of tuition payments to parents of any child enrolled in a nonpublic school that meets the requirements of Pennsylvania's compulsory school attendance law and the provisions of Title VI of the Civil Rights Act of 1964 (i.e. prohibiting discrimination because of "race, color or national origin"). The Act authorizes payments of up to $75.00 for elementary school children and up to $150.00 for secondary school children or the actual tuition amount paid whichever amount is lesser.

The First Amendment of the Constitution of the United States, made applicable to the states through the Fourteenth Amendment, provides as follows:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

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QUESTIONS PRESENTED

The three-judge court below held the Act unconstitutional on its face on the alternative reasoning that either its primary effect is to aid the schools, including religious schools, and thus to advance religion (Opinion, A. 51a); or it supports religion by aiding parents in providing a religious education for their children (A. 54a). The questions presented on this appeal are:

1. Where a state seeks to partially reimburse parents (who alone choose to send their children to a sectarian or non-sectarian school) for tuition expense actually incurred at nonpublic schools, does the fact that the Act fails to require that funds disbursed to parents be restricted to secular education or general welfare services, advance religion in violation of the Establishment Clause?

2. Are not the religious practices of any of the schools to which parents seeking reimbursement choose to send their children constitutionally irrelevant since parents have a right of privacy, free exercise of religion, and freedom to make their own choice, and to be free of inquiry by anyone regarding same? And if so, did not the lower court err in finding that the state was involved in the advancement of religion where it based its entire findings on an extra-judicial statement that 90% of the children whose parents would be eligible for reimbursement were enrolled in schools controlled by religious organizations or having the purpose of promoting a particular religious faith?

3. Where state aid for nonpublic education is to the parent and not to an institution, does not this overcome any problems of entanglement between church and state?

STATEMENT OF THE CASE

On August 27, 1971, the Act became law. It created the Parent Assistance Authority to administer the Parent Reimbursement Fund, but with the provisions that the Authority

> "exercise no direction, supervision or control over the policy determinations, personnel, curriculum, program of instruction or any other aspect of the administration or operation of any nonpublic school or schools." (Section 4, A. 60a)

The fund administered by the Authority does not depend on annual appropriations, but rather is funded by a fixed percentage of the revenue collected under Pennsylvania's Cigarette Tax Act. (Section 5, A.60a).

To be eligible for tuition reimbursement up to $75.00 for elementary school students and $150.00 for secondary students, each parent at the completion of the school year must file with the Authority a verified statement that the student has completed the school year in a nonpublic school and that he has paid, or become legally obligated to pay, tuition in excess of that claimed for reimbursement. (Section 6, A. 60a-61a) A copy of this form appears at A. 86a.

The legislature's statement of purpose, found by the lower court to be a valid secular one, declared, *inter alia*, that in light of the valuable contribution made by nonpublic education to the public welfare, it was in the public interest to use public funds to assist parents by partially defraying the cost actually expended by them for nonpublic education.[10]

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10. The full declaration of purpose states:

(1) That parents who send their children to nonpublic schools assist the State in reducing the rising costs of public education.

(2) The welfare of the Commonwealth requires that this and future generations of school age children be assured ample opportunity to develop to the fullest their intellectual capaci-

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On September 13, 1971, the appellees (plaintiffs below) filed a complaint, (A. 5a) naming as defendant the State Treasurer. They contended that the Act violated the Establishment, Free Exercise and Equal Protection Clauses of the Constitution and sought an injunction against paying out any funds.

On December 21, 1971, Henry E. Crouter, a parent of children in nonpublic schools, filed a motion pursuant to Rule 24(a) to intervene as a party defendant (A. 17a), and an order granting his motion to intervene was entered

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ties. To further this objective the Commonwealth has had in force for many years a compulsory school attendance law.

(3) In the exercise of their constitutional right to choose nonpublic education for their children, parents who support such education make a major contribution to the public welfare. However, the immense impact of inflation, plus sharply rising costs of education, now combine to place in jeopardy the ability of such parents fully to carry this burden.

(4) Should parents of children now enrolled in nonpublic schools be forced by economic circumstances to transfer any substantial number of their children to public schools, an enormous added financial, educational and administrative burden would be placed upon the public schools and upon the taxpayers of the State. Without allowance for inflationary increase, the annual operating cost of educating in public schools, the five hundred thousand students now enrolled in Pennsylvania's nonpublic schools would be an additional four hundred million dollars ($400,000,000). Necessarily added capital costs to construct new facilities or acquire existing facilities would be in excess of one billion dollars ($1,000,000,000). Any substantial portion of these operating and capital costs would be an intolerable public burden and present standards of public education would be seriously jeopardized. Therefore, parents who maintain students in nonpublic schools provide a vital service to the Commonwealth.

Wherefore, it is declared to be the public policy of the Commonwealth:

That, in order to reimburse parents partially for this service so vitally needed by the Commonwealth, and in order to foster educational opportunity for all children, a program of Parent Reimbursement for Nonpublic Education is hereby established. (Section 2, pp. A. 57a-58a).

December 27, 1971. (A. 19a). Intervenor Crouter's counsel in this case also represents the Pennsylvania Association of Independent Schools.[11]

Subsequently 12 other parents of children enrolled in nonpublic schools in Pennsylvania were permitted to intervene. (A. 20a *et seq.* and 29a-30a).

All defendants, including Crouter, moved to dismiss plaintiff's complaint, *inter alia*, on the grounds that in alleging that the Act on its face violated the Establishment Clause, the complaint failed to state a claim upon which relief could be granted. (A. 26a).

In addition, Crouter filed a motion to strike the allegations of paragraph 10 of plaintiffs' complaint concerning the alleged characteristics and religious practices of "educational institutions" on the grounds that these allegations were immaterial since the Act does not authorize and direct payment for the tuition of students in any particular educational institution other than a nonpublic school, and that any inquiry of parents as to the religious practices at the schools to which they choose to send their children violates their constitutionally protected rights (A. 25a).

On April 6, 1972, the three-judge district court denied these motions. Asserting that it was bound by this Court's decision in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), the lower court held that:

¶ The Act expressed a proper secular purpose, i.e., to aid education and not to advance religion;

¶ The fact that aid is given to parents and not to schools does not prevent the payments from having a primary effect of supporting religious instruction and worship in church related schools. The effect of the Act is to aid these schools;

¶ Since the Act may aid some parents to provide a religious education for their children, it supports religion and violates the Establishment Clause.

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11. See Footnote 3, *supra*.

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On April 28, 1972, the three-judge court granted the appellants' motion to dismiss those counts of the complaint relating to the free exercise and equal protection clauses. Thereafter, all defendants filed answers. Intervenor defendants Seth W. Watson and Anne P. Watson then filed a motion for summary judgment which was denied by order of June 20, 1972, and appellees filed a motion for summary judgment.

Thereafter, on July 21, 1972, and based on the Opinion of April 6, 1972, the three-judge court ordered that plaintiffs' motion for summary judgment be granted and that defendant and her successors in office be perpetually enjoined from paying any funds under Act No. 92.

SUMMARY OF ARGUMENT

The constitutionality of the program established by the Act, which provides partial reimbursement to parents who have paid or become legally obligated to pay tuition to a sectarian or non-sectarian school of the parents' own choice that fulfills the state's requirement for compulsory education, has never been ruled on by this Court.

In some respects, Pennsylvania's parent reimbursement program is similar to the federal legislation authorizing the expenditure of federal funds for the education of pages serving in the Congress and the U.S. Supreme Court.[12] That act, which has been in effect and unchallenged for over 25 years, expressly provides that pages may choose to attend private or parochial schools of their free choice and payments shall be made directly[13] to such schools, but at a rate no greater than that provided for in the public schools.

Also, under the GI Bill, thousands of veterans have used government funds at all kinds of schools, both religious and otherwise, even including attending divinity schools. 72 Stat. 1177 (1958), 28 U.S.C. Section 1620.

Although this Court's recent decisions in *Lemon v. Kurtzman* and *Tilton v. Richardson* sets guidelines for analyzing some forms of aid to nonpublic education, neither deals directly with the issues presented by this appeal, particularly since both concerned direct grants to religious institutions, rather than aid to parents, as here.

Since, as in *Lemon v. Kurtzman*, the legislative declarations to the Act clearly indicate a legitimate secular purpose of aiding all forms of nonpublic education, both sectarian and nonsectarian, by easing the financial burdens of parents who must pay the bill, the Court must accept the

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12. August 2, 1946, C. 753, Title II, Section 243, 60 Stat. 839 2 U.S.C. Section 888a (b).

13. In this regard, the provisions of the Parent Reimbursement Act pose even fewer constitutional problems—since as noted in Section below, there are significant constitutional differences between payment to parents and payment to the school or religious order itself.

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stated secular purpose. Furthermore, by making payments to the parents rather than to the school, the Act avoids the entanglement problems which this Court found invalidated Pennsylvania's Purchase of Services Act in *Lemon v. Kurtzman*.

Moreover, because of the inherent differences between payment to a parent and payment to a religious school, and because the religious practices of the schools involved are constitutionally irrelevant, plaintiffs cannot prevail in their efforts to thwart the legitimate aims of the people of Pennsylvania to support nonpublic education and to avoid the catastrophic financial impact if nonpublic education were to fail because of the serious financial crisis facing it.

The cost to Pennsylvania, if nonpublic education failed, is projected by the legislature as an annual addition of $400 million ($400,000,000) plus added capital costs of constructing new facilities in excess of $1 billion ($1,000,000,000). (A. 58a). President Nixon in his Message on Education Reform to the Congress of the United States on March 3, 1970, estimated this cost at $4 billion per year in operations and $5 billion for more facilities.[14]

Aside from the mere financial aspect, the loss of nonpublic schools as an educational alternative would mean the loss of a priceless asset in our heritage of pluralism and democracy.

Finally we believe and urge upon this Court that an examination of the record will demonstrate that plaintiffs have failed utterly to establish by any competent admissible evidence the heavy burden they assume when attacking state action, i.e., to establish that the effect of this Act advances religion or involves state action in sponsorship of religion.

For these reasons, and based upon the constitutional arguments developed more fully below, we urge this Court to reject appellees' attack and thereby uphold the constitutional validity of Pennsylvania's Parent Reimbursement Act.

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14. That entire portion of his message is reprinted in Exhibit B, at pp. 58-59.

ARGUMENT

1. The lower court misinterpreted and misapplied the rules laid down by this Court in *Lemon v. Kurtzman*.

This Court, in the Opinion of Mr. Chief Justice Burger in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), summarized the 3-fold test for measuring whether public aid to non-public education violates the Establishment Clause:

> ¶ "First, the statute must have a secular legislative purpose;
>
> ¶ Second, its principal or primary effect must be one that neither advances nor inhibits religion; *Board of Education v. Allen*, 392 U.S. 236, 243 (1968);
>
> ¶ Finally, the statute must not foster 'an excessive government entanglement with religion.' " 403 U.S. at 612-613. (paragraphs supplied for clarity)

The Pennsylvania Act discussed in *Lemon v. Kurtzman* authorized direct payments to religious or secular schools for purchase of secular educational services, and this Court:

> ¶ found a proper secular legislative purpose;
>
> ¶ declined to rule on whether the Act had a primary effect that advanced religion but inferentially concluded that it did not and let stand the lower court's ruling that it did not (see 403 U.S. at 613-614); but
>
> ¶ ruled that the controls imposed on the institutions receiving funds to insure that funds would not be used for religious purposes constituted undue entanglement between Church and State in violation of the First Amendment.

Contrary to the assertion of the lower court (A. 46a), there is nothing in the Court's decision in *Lemon v. Kurtzman* that controls or bars reimbursement to parents under the Act here considered. As developed in section 2(d) below, where payment is made to the parent, the factual and legal

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considerations are entirely different. And as noted in the foregoing Introduction, this Court has never ruled that public aid to parents is governed by the same strict rules that apply when public funds are paid directly to a sectarian school.

Although *Lemon v. Kurtzman*, as noted above, concerned direct payment to religious and secular institutions, this Court specifically declined to hold that those payments constituted advancement of religion. As this Court has frequently pointed out in Establishment Clause cases, the facts of each case must be carefully analyzed. Some of the general principles applicable are:

> 1. There is no precise and absolute test; "we can only dimly perceive the boundaries of permissible government activity in this sensitive area. . . ." *Tilton v. Richardson*, 403 U.S. 672, 678 (1971);
>
> 2. The role of government is to be neutral—it must neither advance nor inhibit religion. *Board of Education v. Allen*, 392 U.S. 236, 242-43 (1968); its role is that of "benevolent neutrality." *Tilton, supra* at 679;
>
> 3. The test is not whether a religious institution may be benefited, but whether the principal effect of the Act is to advance religion. *Tilton, supra* at 679;
>
> 4. The American public places a high value on the importance of nonpublic education.[15]

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15. ". . . private education has played and is playing a significant and valuable role in raising national levels of knowledge, competence, and experience. Americans care about the quality of the secular education available to their children. They have considered high quality education to be an indispensable ingredient for achieving the kind of nation, and the kind of citizenry, that they have desired to create. Considering this attitude, the continued willingness to rely on private school systems, including parochial systems, strongly suggests that a wide segment of informed opinion, legislative and otherwise, has found that those schools do an acceptable job of providing secular education to their students." *(Board of Education v. Allen*, 392 U.S. 236 at 247-248).

The foregoing principles are best summarized in Mr. Chief Justice Burger's Opinion in *Walz v. Tax Commission*, 397 U.S. 664 (1970) at 669:

> "The course of constitutional neutrality in this area cannot be an absolutely straight line; rigidity could well defeat the basic purpose of these provisions, which is to insure that no religion be sponsored or favored, none commanded, and none inhibited. The general principle deducible from the First Amendment and all that has been said by the Court is this: *that we will not tolerate either governmentally established religion or governmental interference with religion.* Short of those expressly proscribed governmental acts *there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference." (Emphasis added.)*

2. The ultimate issue in this case is whether the Act involves the state in sponsorship or advancement of religion.

(a) *The Act has a secular legislative purpose.*

The lower court properly found that the Act expresses a legitimate secular objective consistent with the Establishment Clause, i.e, to further the state's interest in education for its citizens. (A. 43a).[16] The legislative declaration of purpose set forth in full in footnote 10, *supra*, is a legitimate secular purpose, as was that upheld in *Lemon v. Kurtzman:*

> "Inquiry into the legislative purposes of the Pennsylvania and Rhode Island statutes affords no basis for a conclusion that the legislative intent was to advance religion. On the contrary, the statutes them-

16. Although its opinion clearly demonstrates that it *in fact* did not accept the secular purpose of the legislation. (See Opinion, A. 52a, and discussion in section 2(d) below.)

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selves clearly state that they are intended to enhance the quality of the secular education in all schools covered by the compulsory attendance laws. There is no reason to believe the legislatures meant anything else. A State always has a legitimate concern for maintaining minimum standards in all schools it allows to operate. As in *Allen*, we find nothing here that undermines the stated legislative intent; it must therefore be accorded appropriate deference," 403 U.S. at 613.

(b) *The Act does not have the principal or primary effect of sponsoring or advancing religion.*

The ultimate question presented here is whether the lower court's holding that the principal or primary effect of the Act advances religion is correct. Appellant Crouter contends that it is not.

The lower court held the Act unconstitutional on two grounds:

1. "The mere fact that the Act does not require that parents use the funds to pay tuition at church-related schools does not relieve the state of its duty to preclude the use of its funds to support religious activities," citing as its authority *Tilton, supra* (See Opinion, A. 53a).

2. The unsupported finding in its order of July 21st that "more than 90% of the children attending nonpublic schools in the Commonwealth of Pennsylvania are enrolled in schools that are controlled by religious organizations or that have the purpose of propagating and promoting religious faith." (A. 87a).

The court's reliance on *Tilton* for proposition number one above is totally unjustified. That requirement in *Tilton* applied to a direct grant of funds to a religious institution for physical facilities,—and was mandated by this Court to insure that at no time in the future would the facilities

be used for religious purposes. It has no application whatsoever to the case at bar.

The court's reliance on the statement that 90% of the children attending nonpublic schools attend schools controlled by religious organizations is likewise the weakest kind of bootstrap jurisprudence. Putting aside the validity of the factual premise (see discussion in section 4 below), the fact remains that the lower court assumed a premise which, because of the interposition of the parents and their constitutionally protected status, cannot be used as the basis of a constitutional attack. (See discussion at section 2(d) below).

(c) *The proper test under the Establishment Clause is not whether the Act benefits schools, religious or secular, but whether it advances religion.*

As previously noted, state action can benefit religion or religious institutions without advancing religion. By authorizing payments directly to eligible parents, the Legislature has structured the Act to avoid entanglement and to prevent it from having any involvement in, let alone advancement of, religion.

Even though the Act does not fix eligibility along religious lines, nor restrict in any way the parents' use of the payments when received, the court below held the Act invalid on the ground that since the Act could potentially and indirectly benefit church-related schools, the State has failed to preclude use of its funds to support religious activities.

The court below then erroneously concluded as a matter of law, without any factual record to support its ruling, that the Act's primary effect is to advance religion and that the effect differs materially from the primary purpose of state aid to education.

In reaching such a conclusion, the court has misconstrued the true meaning of the term "advancement of religion."

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(1) *"Mere benefit" is not equivalent to advancement of religion.*

This Court has, on many occasions, taken great pains to distinguish between programs that advance religion contrary to the First Amendment and acts that may indirectly benefit religious institutions as permitted by the Amendment. In so doing the following have been upheld:

¶ the right of Catholic schools to fulfill compulsory educational requirements, *Pierce v. Society of Sisters*, 268 U.S. 510 (1925);

¶ transportation reimbursement payments to parents, *Everson v. Board of Education*, 330 U.S. 1 (1947);

¶ released time for religious instruction from public school, *Zorach v. Clauson*, 343 U.S. 306 (1952);

¶ textbook loans to nonpublic school children, *Board of Education v. Allen*, 392 U.S. 236 (1968);

¶ construction grants to sectarian institutions of higher learning, *Tilton v. Richardson*, *supra*, (1971).

In the non-educational area, there are many decisions affirming the constitutional propriety of state action that clearly benefits religious institutions without advancing religion:

¶ Grants to religious orders for hospitals, *Bradfield v. Roberts*, 175 U.S. 291 (1899);

¶ Sunday closing laws, *McGowan v. Maryland*, 366 U.S. 420 (1961);

¶ Tax exemption from property taxes, *Walz v. Tax Commission*, 397 U.S. 664 (1970).

The test, as stressed by Mr. Chief Justice Burger in the Court's Opinion in *Tilton, is not whether there is an incidental benefit to religion—but whether the primary effect of state action is to advance religion.* See *Tilton*, *supra*, at 679.

(2) *Advancement of religion requires active sponsorship.*

Advancement of *religion* results only when the state *actively* and *directly* promotes religion, such as by the establishment of a state church or by insisting on Bible reading or compulsory prayers. Thus, over the years, the Supreme Court has invalidated education laws on the grounds of primary religious effect in only three cases:

- ¶ *Abington v. Schempp*, 374 U.S. 203 (1963) (compulsory school prayers);
- ¶ *Engle v. Vitale*, 370 U.S. 421 (1962) (compulsory school prayers);
- ¶ *Illinois ex rel. McCollum v. Board of Education*, 333 U.S. 203 (1948) (religious instruction in public schools).

The practices struck down all involved religious exercises in *public* schools and were also programs whose *purpose* was *to advance* religion. By contrast, in the five cases upholding state benefits to nonpublic institutions, individuals were exposed to the benefited institutions only by their own free choice. See *Tilton v. Richardson, supra; Walz v. Tax Commission, supra; Board of Education v. Allen, supra; Everson v. Board of Education, supra; Quick Bear v. Leupp*, 210 U.S. 50 (1908).

(3) *Aiding parents with their education expense does not involve the state in advancing religion.*

The lower court's equating any benefit to religion as the equivalent to advancement of religion is clearly demonstrated by its conclusion that the Act is invalid because it aids parents in obtaining religious education for their children:

> "Finally, even if we held that the Act does not aid sectarian schools, we must still conclude that the Act supports religion because it aids parents in providing a religious education for their children. It would seem indisputable that at least one, if not the main, purpose

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of a parent's sending his child to a religious school is to insure the early inculcation of religion. See Walz, supra, 397 U.S. at 671. Assuming equal secular educational standards as between public and religious schools[17] it is an almost inescapable sequitur that the statutory reimbursement is solely to enable the parents to augment the public school secular education with religious training." (A. 54a-55a).

This Court rejected this very argument in *Pierce v. Society of Sisters*, where it upheld the right of parents to send their children to nonpublic schools, whether religious or secular; in *Allen*, where it refused to invalidate textbook loans simply because these might aid parents in sending their children to nonpublic schools; in *Everson*, where it failed to invalidate free public transportation to Catholic school pupils even though this might aid parents in providing a religious education for their children; and indeed, in *Lemon v. Kurtzman*, where the Court held that the Pennsylvania Act for Purchase of Secular Services which gave money directly to the schools had a proper and legitimate secular objective.

The above quoted language of the court clearly indicates that they in fact improperly refused to accept the secular purpose of the statute although there was no evidence in the record to contradict or overturn the legislative declarations.[18]

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17. There is no factual basis in the record for such an assumption.

18. In *Tilton v. Richardson*, Mr. Chief Justice Burger reaffirmed this Court's extreme reluctance to assume that the proper purposes of a carefully drafted Act will be subverted in the actual administration of the Act:

> "A possibility always exists, of course, that the legitimate objectives of any law or legislative program may be subverted by conscious design or lax enforcement. There is nothing new in this argument. But judicial concern about these possibilities cannot, standing alone, warrant striking down a statute as unconstitutional." 403 U.S. at 679.

And see discussion at Section 4 below.

(d) *Payment to a parent rather than to the school is a distinction that makes all the difference in constitutional result.*

The lower court held that payments to parents, rather than to schools, was a distinction without a difference:

> "However, we do not perceive any constitutional significance in the fact that payments are made in the form of reimbursement to the parents, a conduit plan or directly to the school." (A. 54a)

We believe that this distinction makes *all* the difference.

(1) *Parent becomes a wall of separation between church and state.*

Mr. Chief Justice Burger, speaking for all but Justices Brennan and Douglas in *Walz*, and in delivering the opinion of the court in *Lemon*, rejected out of hand the argument so frequently advanced by opponents of aid to education—that there must be a "wall of separation" between Church and State. Thus, "far from being a 'wall'," he stated, it "is a blurred, indistinct and variable barrier depending on all the circumstances of a particular relationship." (*Lemon v. Kurtzman, supra*, at 614). Pointing out that the State's proper role is one of "benevolent neutrality," he also cited with approval Mr. Justice Douglas' opinion in *Zorach* (released time from public school for religious instruction at parents' option), that "when the State encourages religious instruction . . . it follows the best of our traditions." *Watz, supra* at 672.

Regardless of what test is used for determining the proper degree of separation, when funds are paid to the parent, he does in fact under the Pennsylvania Act become a "*wall of absolute separation*" that terminates any further constitutional inquiry.

To say that there is no constitutional difference between a grant to a parent and one to a school is the same as saying

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that there is no essential difference between (1) an inheritance or gift from a grandparent, payable to the parents to use in their discretion for education of the donor's grandchild and (2) a grant made directly to a particular school designated by the grandparent. To state the question by this analogy is to answer it.

As in the first hypothetical situation above, the parent's absolute freedom of choice under the Pennsylvania Parent Reimbursement Act is very real. It means that no school, religious or otherwise, can count on getting funds since the parent always possesses the absolute right to withdraw his child and send him to another school or to pass up the payments entirely and send his child to public school.

When funds are paid to the parents, this represents the classic case where the government is preserving its traditional role of "benevolent neutrality," of neither advancing nor inhibiting religion.

When the parents, and they alone, make the choice between public, secular, private or religious schools, they do become a wall of absolute separation between Church and State. Since neither the State nor the school can control the funds, neither has any leverage over the other nor are there any points of friction or contact between the two. The parent receives the money and it is *his*—his alone—to spend at the race track, to put in the bank, or to do with whatever else he chooses.

(2) *Inquiry or proffered evidence as to the existence and nature of religious practices, if any, at the school chosen by the parents violates their constitutional rights.*

There is a basic and fundamental *constitutional* difference between payment to parents and payment to a religious school. Where payment is made to the parent for partial reimbursement of the cost of providing secular education which the state requires for his child, the same First

Amendment, which opponents of the Act so zealously profess to protect, likewise forbids inquiry of the parent, by the State or the courts, or offering evidence, regarding religious[19] practices, if any, at the school chosen. Any such inquiry violates the parents' free exercise rights and their traditional freedom of choice and conscience in matters of educating their children and of religion, as well as their right of privacy.[20]

The individual's right of privacy and freedom of choice was reaffirmed in this Court's recent opinion in *Roe v. Wade*, No. 70-18, decided January 22, 1973, slip opinion page 37. As noted long ago in *Meyer v. Nebraska*, 262 U.S. 390, 399 (1922):

> "While this Court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men. [citations omitted]."

This principle was reaffirmed in *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) where the Court upheld the

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19. This is specifically forbidden under the Act. (See §4, A 60a.)

20. *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Baird v. State Bar of Arizona*, 401 U.S. 1 (1971); *Law Students Civil Rights Research Council, Inc. v. Wadmond*, 299 F. Supp. 117, 129 (S.D. N.Y. 1969) affirmed 401 U.S. 154 (1971); *Shelton v. Tucker*, 364 U.S. 479, 488 (1960); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

The Court below recognized this problem but failed to come to grips with it. See discussion below, p. 34, especially footnote 22.

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right of parents to provide for sectarian or non-sectarian training of their children, and again in *Wisconsin v. Yoder*, — U.S. —, 92 S. Ct. 1526 (1972).

Just as an individual has the right to be free from inquiry by the state into the contents of his library, the state cannot tell a man in the privacy of his home what books to read and cannot control a person's private thoughts, *Stanley v. Georgia*, 394 U.S. 557 (1969). So also, the state cannot inquire from a parent as to the reasons for his choice in educating his children. Any such inquiry invades the private rights of parents as individuals. *Watkins v. United States*, 354 U.S. 178 (1957). And for the same reason, it is equally improper to base a decision of unconstitutionality, as did the court below, on the unproved premise that 90% of the children attending nonpublic schools attend religious schools.

This right to privacy, whether it is found in the First, Fourth, Fifth, or Ninth Amendment or in the concept of liberty guaranteed in the Fourteenth Amendment[21] requires that where payments are made to individual parents, it is beyond the scope of permissible inquiry even to attempt to establish as a legal proposition that funds are used for or diverted by the parents to religious purposes. For the same reason, it would be beyond the right of welfare officials to probe into the religious practices of a charity to whom an individual on welfare elected to make a contribution out of money given to him for subsistence by the state,—yet following the logic of the lower court's opinion, any state or federal statute which makes a grant of funds to an individual for any lawful public purpose—i.e., education or welfare,—would fail unless there are strict limitations prohibiting any portion from being used for religious purposes.

The court below, however, in order to justify a decision previously reached, completely disregarded these critical constitutional issues,—issues which it recognized as a

21. See discussion in *Roe v. Wade*, *supra*.

serious problem, but which it declined to rule on at the pleading stage as premature.[22]

Three months later (see the Order of July 21, 1972, A. 87a) the court decided this fundamental constitutional issue without any discussion or citation of cases but by blandly assuming as a proven fact that the reimbursement to parents went directly to schools, 90% of which the court held to be religious even though this fact was denied, put at issue in the pleadings and vigorously objected to.

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22. Footnote 5 of the Court's opinion reads as follows:

"Defendant intervener Crouter has moved under F. R. Civ. P. 12(f) to strike paragraph 10 of plaintiff 's complaint as immaterial and as requiring inquiry into the religious practices and character of schools to which parents choose to send their children in violation of the parents' rights of free exercise of religion, privacy , and freedom of expression.

F. R. Civ. P. 12(f) provides that "the court may order stricken from any pleading, any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Defendant maintains that the allegations of paragraph 10 concerning the religious character of non-public schools are constitutionally irrelevant because the Act does not give aid to schools, but to parents. However, the issue of whether the Act aids religious schools or aids parents to provide a religious education for their children is one of the issues in dispute in this litigation, and the allegations of paragraph 10 are certainly relevant to the plaintiffs' claims.

". . . The motion to strike should be granted only when the pleading to be stricken has no possible relation to the controversy." *Brown and Williamson Tobacco Corp. v. U. S.*, 201 F.2d 819, 822 (C. A. 6, 1953). *See also August v. Bd. of Public Instruction*, 306 F.2d 862, 868 (C. A. 5, 1962), 2A J. Moore, *Federal Practice* §12.21[2] (2d ed. 1968).

Defendant's further objection concerning the constitutionality of inquiring into the religious character of the schools *is premature and should be raised once such information is actually sought*. We therefore deny defendant intervenor's motion to strike paragraph 10. (emphasis added).

See also discussion at section 4 below.

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Under these circumstances, the lower court clearly erred in resting its entire decision on the premise that the Act supports religion, particularly where the record is devoid of any evidence that public funds were in fact used by parents to secure religious education for their children, and where any effort to offer such evidence, must fail because of constitutional limitations that protect the parents or the schools they choose from any such inquiry or attempted proof.

(e) *The reimbursement does not advance religion since the amount paid is less than the cost per pupil of public education.*

Finally, where, as in this case, the amount of reimbursement is substantially less than the per pupil cost of public education,[23] it cannot be contended that public funds are used to advance religion—since under the Act, any school to qualify for parent reimbursement must meet the state's same high standards for compulsory education as do the public schools.

3. By providing state aid to the parent and not to the institution, the Act overcomes any problem of entanglement.

The court below, and we submit properly, rejected plaintiffs' contentions that the Act was unconstitutional because of entanglement problems.

Entanglement problems were overcome by omitting from the Act the "restrictions and surveillance" which had been written into Pennsylvania Act 109 for purchase of service contracts for secular education and which caused that

23. The total general fund expenses compiled from the annual financial reports of Pennsylvania school districts show a total cost per public school pupil in the school year 1969-70 of $943.22. Statistical Report of the Secretary of Education for the school year ending 1970.

Act to be stricken down, *Lemon v. Kurtzman, supra* at 620-621.

Secondly, since under the present Act no payments are made to any religious schools or institutions, the situation "pregnant with involvement," which this Court discussed in *Walz*, does not exist here.

Clearly, when a benefit is conferred on a parent, either by tax credit or by reimbursement (both have the same effect in terms of net dollars to the parent)[24] the problem of administrative entanglement does not exist, since there are no strings attached to the benefit other than that the recipient certify that he has spent X dollars on tuition at a nonpublic school.

Furthermore, the problem of political entanglement does not apply here, where the interested party is an individual—a citizen of the United States, clothed as he is with the Constitutional protection and guarantee of his rights of free speech, freedom of assembly, freedom of petition, et cetera. See *e.g., Hague v. C.I.O.*, 307 U.S. 496 (1939).

Finally, the Act does not pose the entanglement problems which prompted the lower court to strike down the Ohio statute. *Wolman v. Essex*, 342 F. Supp. 399 (S.D. Ohio, 1972, aff'd. No. 71-1664, October 10, 1972). The Pennsylvania Act is self-executing in that the funds are automatically allocated by a percentage of the cigarette tax, and do not require annual action by the general legislature as did the Ohio statute. Compare *United States v. Butler*, 297 U.S. 1 (1936) with *Mulford v. Smith*, 307 U.S. 38 (1939) and *Wickard v. Filburn*, 317 U.S. 111 (1942).

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24. In reality, a tax credit is no different from parent reimbursement. In both cases, the net financial effect to the parent who pays taxes is exactly the same—i.e., either cash in hand or cash credit against taxes owed. Furthermore, there is no difference, insofar as entanglement between church and state is concerned, —because in neither situation is any effort made by or required of the granting authority to check on the scope of religious activities. A tax credit or a payment is self-policing.

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Moreover, since as noted above the rights to free speech and freedom to petition the government are essential elements of democracy, the fact that an individual has exercised these rights and sought passage of legislation which he favors and which will benefit him, cannot be used to declare such legislation unconstitutional.

4. Appellees have failed to meet their burden in proving the Statute unconstitutional.

(a) *Appelles in challenging the Act have the burden of overcoming the presumption of constitutional validity by clear and precise evidence.*

An axiom in constitutional law is that every statute is presumed constitutional. This presumption can only be overcome where those who challenge it meet their burden of proof by relevant and constitutionally admissible evidence. *McDonald v. Board of Election Commissioners of Chicago*, 394 U.S. 802 (1969). A state is presumed to have acted within its constitutional power until the contrary is shown, *Lindsey v. Normet*, — U.S. —, 92 S. Ct. 862 (1972), and a statute must clearly conflict with the United States Constitution for a federal court to override state legislation. *New York v. O'Neill*, 359 U.S. 1, 5 (1969).

This general proprosition of constitutional law applies in First Amendment cases as well as others. As noted in *Everson v. Board of Education*, 330 U.S. 1, 16 (1946):

> "We must consider the New Jersey statute in accordance with the foregoing limitations imposed by the First Amendment. But we must not strike that state statute down if it is within the State's constitutional power *even though it approaches the verge of that power.* See *Interstate Ry. v. Massachusetts*, Holmes, J. [207 U.S. 79] at 85, 88." (emphasis added).

In addition, one who challenges the constitutionality of an enactment must produce a clear, precise and explicit factual showing of unconstitutionality. *Madden v. Commonwealth of Kentucky*, 309 U.S. 83 (1940), *Bute v. People of the State of Illinois*, 333 U.S. 640 (1948), *District of Columbia National Bank v. District of Columbia*, 348 F.2d 808 (D.C. Cir. 1965).

Failure to produce such evidence, particularly in areas involving the First Amendment, requires the Court to uphold the validity of the statute. As stated so clearly in *Board of Education v. Allen*, 392 U.S. 236, 243 (1968):

> "The express purpose of Section 701 was stated by the New York Legislature to be the furtherance of the educational opportunites available to the young. Appellants have shown us nothing about the necessary effects of the statute that is contrary to its stated purpose."

(b) *There is no factual basis in the record in this case to support the lower court's finding that the effect of the Act is different from its stated purpose.*

The record of this case is totally devoid of any evidence that the effect of the Pennsylvania Act so deviates from its avowed and proper purpose as to render it unconstitutional.

The clear purpose and undeniable effect of this legislation is to ease the financial burden of the parents who must pay the bills for nonpublic education—including both sectarian and non-sectarian schools, and thus to safeguard the public treasury against the staggering drain that would occur if these schools were to collapse.

While the lower court verbally acquiesced in the secular legislative purpose of the Act; it then held, with no evidence to support such an assertion, that the purpose of the Act was *in fact* to aid religion:

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"The State cannot maintain that the Act has the purpose of promoting education by supporting non-public schools and then deny that the effect of the Act is to aid these schools." (A 52a)

There are three flaws in the lower court's logic:

First, the legislature's declaration of purpose was misconstrued by the court. The purpose is *to aid parents* who render a vital service to the state and to reimburse them for what would otherwise be an intolerably greater financial burden on the state. Obviously, the ultimate effect is to benefit nonpublic schools. But this is a distinction that makes *all* the difference. By paying the funds to the parents, and not the individual school, the parent and not the school has all the leverage. The school can only get tuition monies when the parent chooses to send his child there.

Second, the court assumed that nonpublic schools are synonymous with religious schools (See order of July 21, 1972), an assumption with absolutely no evidentiary support, and which is patently wrong.

While it is true that religious schools of the Catholic faith predominate in the field of nonpublic education, there are a host of private schools, as well as schools controlled by or related to other religious faiths, such as The Society of Friends (Quaker), Lutheran, Presbyterian, Episcopalian, Methodist, Jewish, and other denominational church related schools, which enthusiastically support the Pennsylvania Act and whose parents would benefit from its provisions. That is precisely why the Pennsylvania Association of Independent Schools has authorized its counsel to assist Crouter in pressing this appeal.

Third, the Court's assumption that 90% of the children attend religious schools committed to a particular religious faith, even if factually correct, is constitutionally irrelevant and beyond the scope of permissible inquiry,

where, as here, the public funds are paid to the parents. For, as developed above, see section 2(d), the parents receiving these funds have a right to be free of inquiry regarding the religious practices or absence of same at the school to which they choose to send their children.

For the purpose of its opinion on the motions to dismiss and to stirke, the lower court accepted as true the allegations of paragraph 10 of plaintiffs' complaint, (A. 7a) concerning alleged religious characteristics of educational institutions which children attend whose parents are eligible for tuition or partial tuition.

Crouter's motion to strike (A. 25a) paragraph 10 was denied by the lower court. The lower court in footnote 5 to its Opinion,[25] recognized this motion presented grave constitutional issues which might pose serious problems to plaintiffs, who, after all, do have the burden of proving religious effect, but dismissed the issues as premature.

These allegations of paragraph 10 of plaintiffs complaint were put at issue in Crouter's Answer to plaintiff's complaint and vigorously objected to on constitutional grounds. (See in particular Crouter's Motion to Alter or Amend Judgment filed on August 3, 1972 and reprinted at A. 88a.)

When confronted, however, with the plaintiffs' subsequent Motion to declare the Act unconstitutional on its face, notwithstanding that the pleadings put these matters at issue, the court rode roughshod over this constitutional issue. With no further evidence of any kind before it, the court found in its order of July 21, 1972, that:

> "more than 90% of the children attending nonpublic schools in the Commonwealth of Pennsylvania are enrolled in schools that are controlled by religious organizations or that have the purpose of propagating and promoting religious faith." (A. 87a)

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25. See footnote 22 for the entire footnote.

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The court based its entire finding that the primary effect of the Act was to advance religion on the extra-judicial statement appearing above in its Order of July 21, 1972. And this was done in the face of the finding that the primary *purpose* of the Act was to aid and advance non-public education, which has been universally recognized as a proper and highly laudable public purpose. See *Board of Education v. Allen*, 392 U.S. 236, 247-248.

In its opinion, the lower court held that payments to the parents in reimbursement of tuition aided the schools, including religious schools. The Court then held that the failure to restrict this aid to secular use, despite the secular purpose of the Act, violated the Establishment Clause.

This holding clearly ignores *Allen* and *Everson*, notwithstanding the attempt of the lower court to distinguish those cases as involving "non-ideological or secular" school activities.

However, reimbursing parents for bus transportation to nonpublic schools or providing free transportation and thus saving parents the cost, is not advancement of religion, *Everson, supra;* nor is tuition reimbursement. Either may permit a child, otherwise unable, to attend non-public school; and once there, the student obviously participates in secular training and religious, if any. (The New Jersey statute upheld in *Everson* applied only to Catholic nonpublic school children.)

Moreover, the lower court ignored a critical feature of *Allen, supra.* The Court in *Allen* refrained from striking down the New York textbook statute *because there was no evidence in the record* that the textbooks loaned were religious in content *and the Court therefore assumed that the effect of the statute was the same as its stated purpose:*

> "Appellants have shown us nothing about the necessary effects of the statute that is contrary to its stated purpose." *Allen, supra* at 243. See also *Allen,* at 245 and 248.

Similarly, absent evidence the court cannot conclude that the effect of the Act differs from its secular purpose.[26]

(c) *The lower court erred in striking down the Act because of a "possibility" that it could aid religious schools.*

The court below incorrectly assumed that it had power to hold a statute unconstitutional if it could conjecture a "possible" misuse of government funds. As it noted:

> "The Court can conclude that the statute has the effect of advancing religion if the terms of the statute fail to preclude a *possible* use of government funds to promote religious exercises." (A. 49a).
>
> . . .
>
> "It is clear that a *possible* and quite likely use of the aid under review is to enable parents to continue to pay tuition at sectarian schools." (A. 53a). *(emphasis supplied).*

Not only is this legal theory directly controverted by the holding of *Allen* and *Everson* discussed immediately above, but this Court has frequently noted that a Court cannot strike down a state statute on a mere possibility:

> "Striking down a state law is not a matter of such light moment that it should be done by a Federal Court

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26. The absence of any factual record also distinguishes this case from *Wolman v. Essex, supra.*

The Ohio Court's opinion was based upon a full and thorough review of an extensive factual record much of which was irrelevant on constitutional grounds but from which it could have been argued that its effect was different from its stated purpose—i.e., that its effect was to favor a particular religious denomination.

On the contrary, no evidence concerning any factual issues has been submitted in this case.

Moreover, as noted by intervenor defendant Crouter's motion to strike, and motion to alter or amend judgment, any inquiry concerning a parent's use of the reimbursement, his religious views, or the religious practices at schools attended by his children violates his freedom of conscience and religion, and invades his privacy. (See discussion at section 2(d).

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ex mero motu on a postulate neither charged nor proved but which rests on nothing but a possibility. Cf. *Liverpool N.Y. & P.S.S. Co. v. Commissioners of Emigration*, 113 U.S. 33, 39." *Everson, supra* at p. 4, footnote 2.

This Court's voiding of the 20 year provision in *Tilton v. Richardson*, 403 U.S. 672 (1971) was not based upon "a possibility" but upon the fact that the building after twenty years had a value which was unrestrictedly contributed to a religious body, since in *Tilton*, unlike here, the funds went directly to the religious institution, and in no way involved parents.

CONCLUSION

Historically, private elementary and secondary education has made a significant contribution to and played a unique role in this country. This role has been recognized by this Court. *See, e.g., Pierce v. Society of Sisters, supra, Allen, supra.* Private education must be preserved if we are to retain the pluralism and spirit of democracy to which our Constitution and judicial system are dedicated. However, the continued viability and vitality of private education is imperiled by the severe economic crisis facing it.

Fortunately, our people are at long last moving towards solutions, as their elected representatives in the Congress and state legislatures throughout the land genuinely experiment to find ways that public monies can be used to further nonpublic education and still preserve the neutrality of government by neither advancing nor inhibiting religion in the process.

The cases are legion in church-state relations where the judicial branch of Government has been called on as the arbitrator in the delicate balancing of conflicting interests. While there always will be a wide diversity of views, the fact remains that a majority of the Justices of the Supreme Court in decisions from *Bradfield v. Roberts*, 175 U.S. 291 (1899) to *Lemon v. Kurtzman*, 403 U.S. 602 (1971) have

recognized certain basic principles of constitutional law that lead inexorably to the conclusion that the will of the people of Pennsylvania should not be thwarted by declaring the present Act unconstitutional. These principles are:

¶ Public aid to private education serves a proper public purpose.[27]

¶ It is possible to separate religious from secular education. A majority of the Justices have rejected[28] the absolutist view that religion and secular education are so intertwined, with each permeating the other, that any form of aid to education that in any way benefits religion must be totally barred by the First Amendment.

¶ It is both possible and constitutionally permissible to distribute public funds or use state action in such a way that religion and religious institutions may indirectly benefit while still preserving government neutrality.[29] This is particularly so where funds are paid not to the institution, but to those who directly benefit and can control their use.

Finally, we recognize and are sensitive to the awesome and difficult responsibility which faces this Court in deciding the questions raised by the Church-State cases now before this Court. These are questions which vitally affect the national interest:—i.e., whether pluralism or a monolithic structure of public education is to prevail. We believe

27. *Everson v. Board of Education, supra* at 7; *Board of Education v. Allen*, 392 U.S. 236, 247-248 (1968).

28. See Opinion of Chief Justice Burger, in *Lemon v. Kurtzman*, 403 U.S. at 613 where he stated:

> "The legislatures of Rhodes Island and Pennsylvania have concluded that secular and religious education are identifiable and separable. In the abstract we have no quarrel with this conclusion."

And also Court's Opinion in *Tilton*, 403 U.S. at 679-680.

29. See Discussion *supra*, Sections 2(c) and (d).

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that the former is more in keeping with the free democratic traditions of this country, and we also recognize that this is a question of educational philosophy on which there is much difference of opinion. But we suggest that this is an issue which has been resolved by the people in open debate through their elected representatives[30] and not a legal issue which this Court must resolve.

Mindful of the frequent admonition that a court's power to declare state action unconstitutional should be sparingly exercised, only in compelling circumstances, and then only with great care,[31] we urge this Court to reject the constitutional attack on the Pennsylvania Act, particularly in view of the strong public interest, as evidenced by extensive state action in this area[32] to preserve and improve the high quality of private education.

We ask this Court to rule that the plaintiffs have failed utterly to meet the heavy burden they undertake when seeking to upset state action in an area which so vitally affects the national interest. We ask this Honorable Court to find that the Pennsylvania Reimbursement Act:

¶ does not have as its primary effect the advancement of religion;

¶ represents a lawful and valid expression of the genuine desire of all the people of this Commonwealth to

1) ease the financial burden of those parents who must pay the lion's share of the cost and

2) thereby avoid the resulting financial crisis to the public treasury should all nonpublic education fail;

---

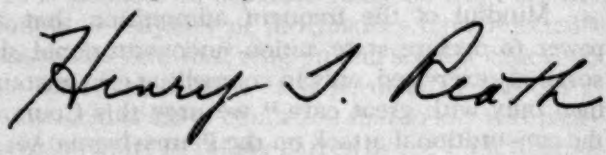
30. See Exhibit C, pp. 60-61, *infra*.

31. *Walters v. City of St. Louis*, 347 U.S. 231 (1954); *New York v. O'Neill*, 359 U.S. 1 (1959).

32. See Exhibit C, *infra*.

¶ eliminates the objectionable entanglement features that were fatal to the Pennsylvania purchase of secular services plan in *Lemon v. Kurtzman*, by reimbursing parents rather than making payments directly to the schools or to religious orders that operate them.

Respectfully submitted,



HENRY T. REATH
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Attorneys for Appellant Crouter

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APPENDIX

EXHIBIT A

[Caption omitted in printing].

Amicus Curiae Brief of Benjamin Banneker Urban Center in Support of Defendants Motion to Dismiss Pursuant to F.R.C.P. 12

The Benjamin Banneker Urban Center (hereinafter "Center") is a privately controlled non-profit corporation organized and existing under the laws of Pennsylvania. It files this Amicus Curiae brief in opposition to plaintiffs' attack on the constitutionality of the "Pennsylvania Parent Reimbursement Act for Non-Public Education" (hereinafter "Act") [Act 92, 1971].

The Center is located in West Philadelphia's predominantly Black Mantua community, composed of approximately 200 acres with a population of about 22,000. Mantua is bounded by Spring Garden Street, 40th Street and the Penn Central railroad tracks and Drexel Institute of Technology. Mantua suffers considerably from urban blight, such as poverty, unemployment and under-employment, juvenile delinquency, drug addiction, sub-standard housing, poor school attendance, malnutrition and poor

sanitation. Enrollment in the Community's local public schools is virtually all black.

The Center is an innovative, pluralistic educational institution which cooperates closely with the School District of Philadelphia, with local businesses, industry and institutions of higher learning and with the Young Great Society.

The Center opened in 1970 with two groups of students, a class of approximately 75 seventh graders and a group of approximately 25 dropouts, hard-core rejects from and of the traditional public school system. During its first six years of operation, the Center plans to expand upward at the rate of one grade a year until it is serving grades 7 through 12. Long range plans project that by 1990 the Center will be a "total school" extending from preschool to graduate studies.

The Center's philosophy is embrasive and hopeful. The Center believes, *inter alia*, that:

(1) All young people must have a right to a comprehensive first-rate education of their choosing, including a right to essential supportive services, such as, medical, counselling, nutritional, and those elements which make a student free to learn.

(2) All young people must not simply be trained for narrow or specified careers, but must be educated to best compete for survival and success in our increasingly complex and demanding society. Fundamental to this survival and success is skill in conceptualization and analysis, the ability to effectively direct knowledge to solve new problems.

To achieve its educational goals the Center has pioneered a grass roots educational system including:

(1) Innovative Educational programs

(2) Vocational Counselling and Guidance Services

(3) New Careers in Rehabilitation

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(4) Developmental Human Services for Children and Families
(5) Medical-Mental Health Services
(6) Library Services
(7) Cultural Enrichment

The Center is clearly a nonpublic school within the meaning of the Pennsylvania Parent Reimbursement Act for Nonpublic Education (hereinafter the "Act"), and likewise meets the requirements of Title VI of the Civil Rights Act of 1964. Parents of children attending the Center are eligible to seek the Act's partial reimbursement for tuition. The Center files this brief on their behalf because partial tuition reimbursement to parents will encourage the Center and other similarly situated pioneer education institutions which are trying to develop meaningful new responses to the traditional educational defaults which have contributed too much to today's urban problems. The Center's pupils are not strangers to the urban vicissitudes aforestated at p. 1.

In many cases, they are the children of broken homes, broken careers, and broken hopes. For them, the Center is attempting to structure a new and relevant educational process which can be molded to their individual educational needs. The traditional public school structure cannot offer this mobility and individual flexibility.

The Act recognizes the wisdom and necessity of energizing the traditional public school system by pursuing creative and individualized private school opportunities.

The Act's statement of legislative purpose reiterates the Commonwealth's policy of giving children full opportunity to develop their intellectual opportunities. The Center was founded on the theory that parents must have an alternative choice to the existing public education system. The search for countervailing quality educational alternatives is fueled by educational institutions such as the Center.

Accordingly, the Center adopts the principles and reasoning set forth in the Amicus Curiae Brief of the Pennsylvania Association of Independent Schools which has been filed with the Court in support of the Act's constitutionality.*

Respectfully submitted,

/s/ JOHN M. ELLIOTT

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---

* See Docket Number 26 of the Docket Entries in the United States District Court for the Eastern District of Pennsylvania.

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EXHIBIT B

1. *The significant and unique role of independent education.*

> "I believe that the independent preparatory schools have a significant role in American education. Nothing has helped the independent schools more than the fact they have produced so many national leaders who saw beyond the horizon of their own life. The careers of such men have done more than anything else to make our democracy accept the value of the independent schools."
>
> John F. Kennedy, President of the United States of America in address to Choate School, Wallingford, Connecticut in 1963.

Not only has independent education made a significant contribution to the national interest in contributing vast numbers of well educated, highly motivated leaders in business, the professions and public service,[1] but independent education because of its greater freedom from governmental and bureaucratic controls has been freer to experiment and innovate in new methods and areas of education.

Its successes have provided leadership and healthy competition for public education and vice versa. Each in a sense complements the other and gains strength from the interaction between the two.

Harold W. Dodds, former President of Princeton University, has made an eloquent statement on the case

---

1. We would submit that it is not just accident that two of the most imaginative and visionary leaders in government of this century were products of the independent secondary school system —Franklin Delano Roosevelt and John F. Kennedy.

for independent education.[2] Stressing its primary function as the preservation of freedom, he stated:

> "Although today the independent schools educate but a small fraction of our youth of pre-college age, my belief that they must survive and prosper roots in a general political philosophy about freedom in general; particularly in what such schools contribute to freedom as well as to education. It is no shock to remind you that the last generation has been featured by a great expansion in the size and scope of government all over the world."

Dr. Dodds' emphasis on the public interest, which we as a people have in the healthy survival of the independent school as a leader and as a yardstick against which may be measured the quality of public education, is particularly germane:

> "Therefore, one chief reason that the independent schools must prosper exists in the freedom they have to concentrate on a mental muscle—stretching education for those able to receive it, to uphold the banner of the well-educated mind in a sound personality and a sound body.
>
> "Remember that the independent schools, as they honestly strive for excellence, influence the public school system by inspiring a spirit of emulation, as the private university has inspired the state university, a proposition with which most presidents of state universities will agree.
>
> "On the other hand, the public schools, particularly when they are good, afford healthy competition for the independent schools and remind the latter of

---

2. Speech delivered at Springside School, Philadelphia, on April 2, 1964—reported in *Springside Briefs*, Volume 1, Issue No. 5, page 1.

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their constant obligation to serve our democracy well, and not merely a particular segment of our population."

The United States Commissioner of Education, Harold Howe, II, in an address to the National Association of Independent Schools, on March 4, 1967, said:

> "You [independent schools] can experiment with new course offerings that would arouse strong resistance if put forward by the public schools. As an example, I think independent schools have taken a commendable step forward with their decision to introduce major programs of sex education. Your independence, then, gives you the freedom to shape an educational experience which is often superior to that available in many public school systems.[3]

See also, "Message From President Nixon on Education Reform to the Congress - March 3, 1970", discussed at pp. 58-59 of Exhibit B.

2. *The case for pluralism in our society.*

Independent schools also preserve and further our nation's commitment to a general philosophy of pluralism which is essential to the preservation of freedom in a democratic society.

From the early days of the Republic, Americans have formed private associations for myriad purposes. These associations have been the well-springs for creativity in our society and have preserved our commitment to pluralism and equality.

John W. Gardner, former Secretary of Health, Education and Welfare has more recently, in a stirring article

3. The nonpublic schools provide a diversity which our educational system would otherwise lack. They also give a spur of competition to the public schools—through which educational innovations come, both systems benefit, and progress results. 91st Congress, 2d Session, House of Representatives Document No. 91-267.

entitled "What Kind of Society Do We Want?" (*Readers Digest*, Sept. 1969), emphasized the danger of too much reliance on public institutions.

Commenting on the qualities a society needs for self-renewal, he states: "First of all, it would be characterized by pluralism, by variety, alternatives, choices and multiple foci of power and initiative."

Later, he too stresses the role of education:

> "The society capable of continuous renewal will be one that develops to the fullest its human resources, that removes obstacles to individual fulfillment, that emphasizes education, life long learning and self discovery."

Dr. Dodds, in his address, points out that our freedom in education, as in other areas, depends on a pluralistic society, opposed to an all embracing monolithic structure. Stressing the importance of healthy competition with government, he stated:

> "Nothing is clearer to me than the principle, enunciated by Lord Acton, that liberty is possible only in a society in which there are strong voluntary and independent centers of action and opinion outside of government. No matter how honest, well-intended and expert our government official may be, we cannot resign our civic and social responsibilities to any political body or to any autocracy of administrative experts, even experts in education. The notion that they are in a better position than the people generally to make basic public decisions for us, or to administer them when made except under popular controls, is an egregious myth."

But Dr. Dodds in his address also points out, that to be effective, the competition must excel—and this costs money:

> "Most decidedly the case for the independent schools is not to be found simply in the opportunity

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which they enjoy to be independent; they will be judged in the last analysis by what they do with their independence. They achieve their basic purpose only as they achieve excellence. And excellence in any line, including education, costs money and the money must come from the pocketbooks of individuals who are already paying taxes to support public education."

At this point, it should be observed that the Pennsylvania tuition reimbursement program which gives the money to the parent—and not the school—will promote greater competition and freedom for all educational institutions. For now the parent of the public school child has been given additional leverage (i.e., a measure of greater economic freedom to enroll his child in a nonpublic tuition school) to insist upon better quality in the public school system. And conversely competition will be increased among nonpublic schools, where here again the parent has greater leverage because he by his choice of schools has control over whether his share of the public funds will ever get to a particular school.

3. *The financial crisis facing independent secondary education.*

It is a matter of common knowledge of which this Court may take judicial notice that independent and all nonpublic schools are now facing a grave economic crisis which is exacerbated by current inflationary trends in the nation's economy.

Faced with spiralling costs, they are being forced to boost tuitions to such a level that would inevitably price these schools into practical extinction.[4]

---

4. In the past two years, close to a thousand nonpublic elementary and secondary schools closed and most of their displaced students enrolled in local public schools. Message of the President on Education Reform, *supra*.

In order to preserve its scholarship programs and its general philosophy of serving a wide social and economic cross-section of the community, the independent school must be able to charge tuitions commensurate with their expenses. And unless some way can be found to ease the financial burden on parents, more and more students will drop out, thereby making it increasingly expensive for those that remain—and the transfer to the public system will add an intolerable burden on an already overburdened system.

Theodore R. Sizer, Dean of The Harvard Graduate School of Education has stressed the acute financial crisis facing nonpublic schools and the risk spiralling costs could have on scholarship aid to provide a varied student body. He said:[5]

> "How to finance this necessary and responsible increased cost? In my judgment the average independent school will not be able to increase its income the requisite amount and still hold tuition down low enough to provide for a varied student body. The only recourse is public funds, and I am prepared to argue that support of private education is in the public interest. Public education needs competition the pace setting and goading which strong independent schools might provide."[6]

Speaking on the importance of public funds to aid private education, United States Commissioner of Education Harold Howe said on the same date:

> "We will see more, rather than less, Federal aid to education in the years ahead for two reasons:
>
> First, the Congress knows that State and local funds alone cannot buy the kind of education we need

5. Address before the Teacher Training Section of the National Association of Independent Schools, March 4, 1967.
6. Independent School Bulletin, May 1967, 19, 21.

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to prepare students for a technological society and for a world beyond our shores that is infinitely more complex today than it was two decades ago.

Second, a genuinely democratic society cannot tolerate the inequitable distribution of quality that characterizes our State education system."[7]

A. *Relief of public burden*

That nonpublic education relieves the taxpayer of a very substantial financial burden is a fact not subject to question. This is borne out by Legislative Finding 4. to the Pennsylvania Act now under attack, which reads as follows:

"(4) Should parents of children now enrolled in nonpublic schools be forced by economic circumstances to transfer any substantial number of their children to public schools, an enormous added financial, educational and administrative burden would be placed upon the public schools and upon the taxpayers of the State. Without allowance for inflationary increase, the annual operating cost of educating in public schools the five hundred thousand students now enrolled in Pennsylvania's nonpublic schools would be an additional four hundred million dollars ($400,000,000). Necessarily added capital costs to construct new facilities or acquire existing facilities would be in excess of one billion dollars ($1,000,000,000). Any substantial portion of these operating and capital costs would be an intolerable public burden and present standards of public education would be seriously jeopardized. Therefore, parents who maintain students in nonpublic schools provide a vital service to the Commonwealth."

It takes few calculations to demonstrate the extent of the tremendous financial burden, both as to annual operat-

7. Independent School Bulletin, May 1967 at 17.

ing expenses and capital expenditures for physical plant, that would be thrust on the taxpayers if it were not for the nonpublic schools.

Out of the total annual expenditure of $1,629 billion dollars by the Commonwealth and nonpublic schools for all elementary and secondary education in 1967, $400 million represented the value of the contribution for nonpublic schools.[8]

Estimates on the capital costs of building new facilities to accommodate the additional pupils now in nonpublic schools could run as high as $1.2 billion.[9]

And in President Nixon's report to the Congress of March 3, 1970, on Education Reform, he stated:

> "(f) Non-Public Schools.—The non-public elementary and secondary schools in the United States have long been an integral part of the nation's educational establishment—supplementing in an important way the main task of our public school system. The nonpublic schools provide a diversity which our educational system would otherwise lack. They also give a spur of competition to the public schools—through which educational innovations come, both systems benefit, and progress results."
>
> "Should any single school system—public or private—ever acquire a complete monopoly over the

8. This figure was determined by multiplying the estimated cost per pupil ($637) by the number of students (627,000).

Source: Statistics of Public, Elementary and Secondary Schools—U.S. Department of Health, Education and Welfare, Fall, 1967. Table 12, p. 26; and see "Public School Financial Statistics Report 1967-68" Vol. 8, No. 7, 1969, p. 2.

9. This additional capital cost is computed by multiplying the estimated capital cost per student ($2,000) by the number of students (627,000).

Source: "An appraisal of the Pennsylvania School Subsidy System" (prepared for the Superintendent of Pa. Dept. of Public Instruction by the State Division of the Pa. Economy League, Inc., July 1968, p. 6).

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education of our children, the absence of competition would neither be good for that school system nor good for the country. The nonpublic schools also give parents the opportunity to send their children to a school of their own choice, and of their own religious denomination. They offer a wide range of possibilities for education experimentation and special opportunities for minorities, especially Spanish-speaking Americans and black Americans."

"Up to now, we have failed to consider the consequences of declining enrollments in private elementary and secondary schools, most of them church supported, which educate 11% of all pupils—close to six million school children. In the past two years, close to a thousand nonpublic elementary and secondary schools closed and most of their displaced students enrolled in local public schools."

"If most or all private schools were to close or turn public, the added burden on public funds by the end of the 1970's would exceed $4 billion per year in operations, with an estimated $5 billion more needed for facilities."

"There is another equally important consideration: these schools—non-sectarian, Catholic, Protestant, Jewish and other—often add a dimension of spiritual value giving children a moral code by which to live. This government cannot be indifferent to the potential collapse of such schools."

EXHIBIT C

STATE PROGRAMS FOR ASSISTANCE TO NONPUBLIC SCHOOLS—1973[1]

	Purchase of Services		Textbook Aid		Tax Credits		Tuition Grants		Health & Welfare Services		Busing	
	Enacted	Proposed*	Enacted	Proposed*	Enacted	Proposed*	Enacted	Proposed*	Enacted	Proposed*	Enacted	Proposed*
Alaska	X											
Calif.			X		X			X			X	
Conn.							X		X		X	
Delaware									X		X	
District of Columbia											X	
Hawaii					X							
Illinois			X				X[2]		X		X	
Indiana			X			X						
Iowa			X						X			
Kansas						X					X	
Kentucky											X	
Louisiana			X		X		X				X	
Maine	X								X		X	
Mass.				X						X	X	
Michigan									X		X	
Minnesota					X						X	
Mississippi			X									
Missouri			X						X			
Nebraska			X									
Nevada									X			
N. Hampshire									X		X	
New Jersey			X								X	
New Mexico			X								X	
New York	X[3]		X		X[4]		X[4]		X		X	
N. Dakota											X	
Ohio			X		X[5]		X[6]		X		X	
Oregon											X	
Penn.			X				X[7]		X		X	
Rhode Island			X						X		X	
S. Dakota	X					X			X		X	
Vermont	X[8]								X		X	
W. Va.	X										X	
Wisconsin						X					X	

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* As used in this table, a proposed plan indicates a plan which has been introduced in the legislature or advocated by a responsible governmental authority.

1. Based on reports by the National Catholic Educational Association, "State Aid to Nonpublic Schools as of September 1, 1972" and "State Aid to Nonpublic Education as of February 1, 1973."

2. The Illinois bill was held not consistent with recent U. S. Supreme Court decisions by the Cook County Circuit Court. The decision is being appealed to the Illinois Supreme Court.

3. The Mandated Services Act of 1970 was ruled unconstitutional in April 1972 by a three-judge Federal District Court. The U. S. Supreme Court has noted probable jurisdiction. *Levitt v. Committee for Public Education and Religious Liberty* (October Term, 1972, Nos. 72-269, 72-270, and 72-271).

4. The New York Act was ruled unconstitutional in Federal District Court, The U.S. Supreme Court has noted probable jurisdiction. *Nyquist et al. v. Committee for Public Education and Religious Liberty* (October Term, 1972, Nos. 72-694, 72-753, 72-791 and 72-929).

5. The Ohio bill was held unconstitutional in Federal District Court, and appeal will probably be made to the U. S. Supreme Court.

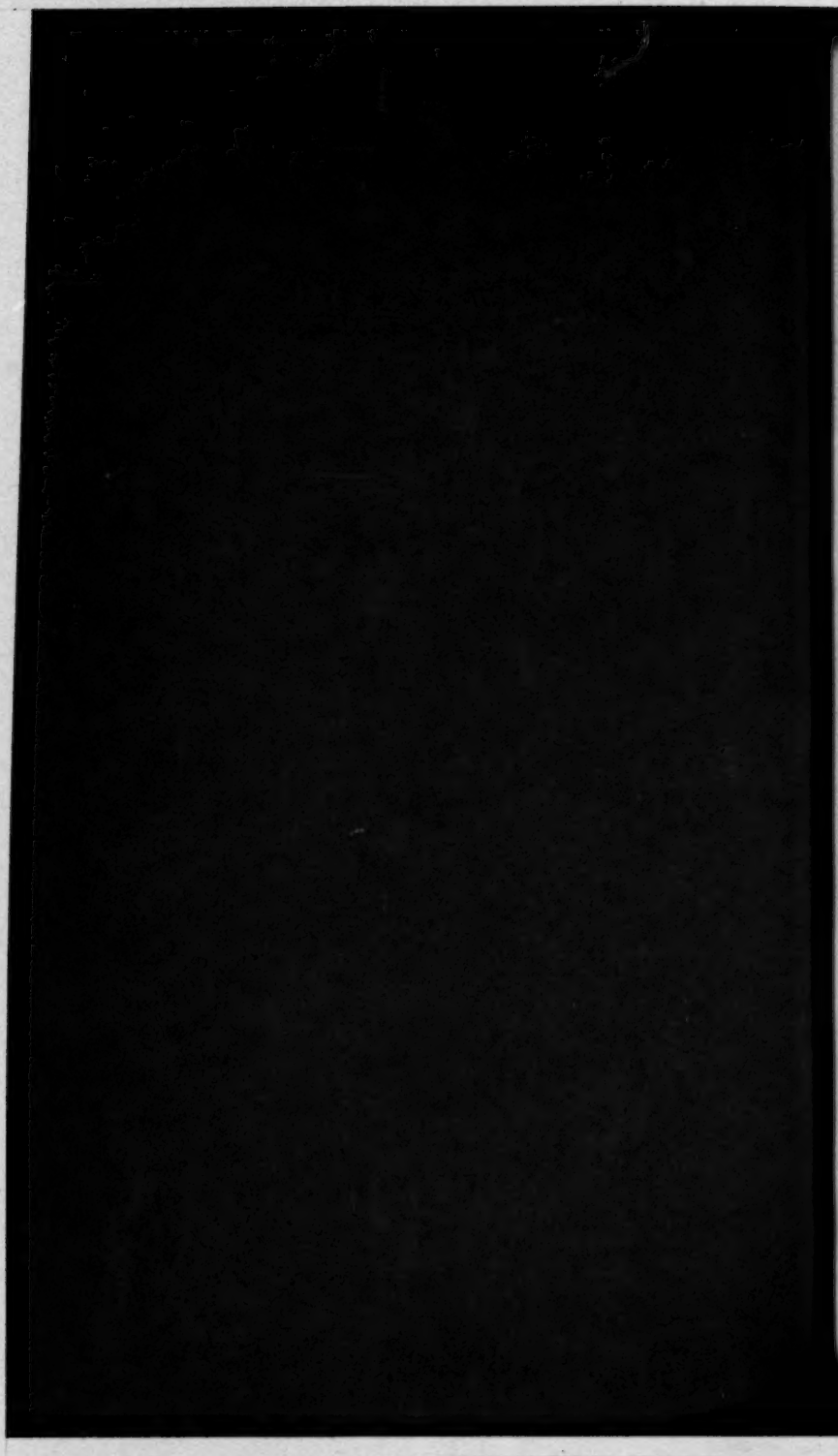
6. The Ohio bill was ruled unconstitutional in Federal District Court in 1972, and was refused a hearing by the U. S. Supreme Court. *Essex v. Wolman* (No. 71-1664, October 10, 1972).

7. The Pennsylvania bill was declared unconstitutional in Federal District Court in 1972; the U. S. Supreme Court noted probable jurisdiction, *Sloan v. Lemon, Crouter v. Lemon,* (October Term, 1972, Nos. 72-429 and 72-620).

8. A 1971 Vermont aid law was ruled unconstitutional by the U. S. District Court in March of 1972.

NOTE:

Ohio and California provide for aid to nonpublic school children for vocational education. Mississippi provides for financial assistance up to $240 annually for nonpublic school pupils with learning disabilities. New York makes provision for assistance to handicapped children, as well as some salary aid to teachers in private orphanages. North Dakota permits lay teachers in nonpublic schools to participate in the public school teacher retirement program and exempts nonpublic schools from state sales tax for certain items. Oregon and Washington allow nonpublic schools to use the public school central purchasing agency.



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Pennsylvania Cigarette Tax Act, Pa. Stat. Ann., Tit. 72, §3169.101 et seq. (Supp. 1972) 18

AUTHORITIES:

Ely, Legislative and Administrative Motivation in Constitutional Law, 79 Yale L.J. 1205 (1970) 11

MISCELLANEOUS:

Statistical Report of the Secretary of Education for the School Year Ending June 30, 1971 9

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1972
No. 459

GRACE SLOAN as State Treasurer of the Commonwealth of Pennsylvania

and

JOSE DIAZ and ENILDA DIAZ, His Wife, WILLIAM ZIMMERSPITZ and NANCY ZIMMERSPITZ, His Wife, F. CARL KRETZMANN and KATHERYN L. KRETZMANN, His Wife, ARTHUR HARVEY and MURIEL HARVEY, His Wife, DANIEL F. X. POWELL and ANNA T. POWELL, His Wife, SETH W. WATSON, JR., and ANNE P. WATSON, His Wife, and HENRY E. CROUTER,
Appellants

v.

ALTON J. LEMON, NEAL F. BRACKEN, and BENJAMIN S. LOWENSTEIN,
Appellees

On Appeal from the United States District Court for the Eastern District of Pennsylvania.

BRIEF FOR APPELLANT, GRACE SLOAN

OPINION BELOW

On July 21, 1972, the three-judge District Court granted Appellees' (plaintiffs below) Motion for Summary Judgment based on an Opinion of April 6, 1972, which denied Appellants' (defendants' below) Motions To Dismiss. That Opinion is reported at 346 F. Supp. 1356 (E.D. Pa. 1972) and is in the Appendix beginning at page 37a.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, Amendment I, as applicable to the States by the Fourteenth Amendment:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ."

Parent Reimbursement Act for Nonpublic Education, Act 92 of the Laws of Pennsylvania, 1971, P. L. ——, Pa. Stat. Ann., Tit. 24, §5701, et seq. (Supp. 1972) (hereinafter, the Act). The Act is set forth in the Appendix, commencing at page 56a.

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QUESTION PRESENTED

Is the Constitution violated by a State's economically motivated program for parental reimbursement of a small portion of the cost of nonpublic education which helps to relieve the State of its burden of supplying education to the children of such parents?

STATEMENT OF THE CASE

The Commonwealth of Pennsylvania in enacting its Parent Reimbursement Act for Nonpublic Education stated in the title of the Act that its purpose was to avoid "increased costs of public education" (App. 56a). Section 2 of the Act further stated that parents who maintain their children in nonpublic schools "provide a vital service to the Commonwealth" (App. 58a). Under the Act parents of nonpublic students are reimbursed $75 for elementary school tuition and $150 for secondary school tuition.

On September 13, 1971, Appellees filed a Complaint attacking the Act and alleging that it violated the Establishment, Free Exercise and Equal Protection Clauses of the Constitution. Thereafter, parents of children attending sectarian and nonsectarian nonpublic schools in the State intervened as parties defendant.

All defendants moved to dismiss the Complaint for failure to state a claim for relief. On April 6, 1972, the three-judge District Court denied these motions (App. 56a). On April 28, 1972, the Court granted motions of the defendants to dismiss those counts of the Complaint relating to the Free Exercise and Equal Protection Clauses (App. 64a).[1]

After all defendants filed answers, plaintiffs moved for summary judgment. That motion was granted

[1] Appellees have not appealed from that determination.

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on July 21, 1972 and the Court, relying on its previously filed Opinion of April 6, 1972, permanently enjoined the State Treasurer from paying any funds to parents of children attending nonpublic schools.

SUMMARY OF ARGUMENT

A legislatively stated purpose, real and uncontradicted, should be given due regard in the exercise of judicial power to upset legislative enactments. In this case the legislative purpose is stated unequivocally and there is no contrary averment of the fact. The principal and primary effect of the Act is the achievement of its stated purpose. Other effects of the Act are not truly significant because: (1) benefits to religion are only incidental and indirect; (2) there is no entangling relationship with religion; and (3) a small payment for valuable services which are the primary obligation of the Commonwealth under its Constitution does not create a climate for significant political disagreement.

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ARGUMENT

I. THE PURPOSE AND PRIMARY EFFECT OF THE ACT RELATE TO THE SERIOUS SCHOOL FINANCIAL PROBLEM OF THE COMMONWEALTH

The constitutionality of enactments frequently turns upon the real purpose of the legislation. Legislative findings can support the constitutionality of an act. Constitutionality that turns upon facts is subject to judicial review. First, it will be shown that the purpose of the Act is bona fide and uncontested. Second, it will be shown that the primary objective and effect of the Act is economic and not religious.

A. The Legislative Purpose Is Real and Uncontradicted

In no uncertain terms the Legislature stated its purpose in the title of the Act as follows:

> "Creating an authority *for the purpose of avoiding increased costs of public education* by providing partial reimbursement for nonpublic education and defining its powers and duties." (Emphasis supplied.) Preamble, Act (App. 56a).

Section 2 of the Act declared the public policy of the Commonwealth, making its legislative finding that (1) "parents who send their children to nonpublic schools assist the State in reducing the rising costs of public education;" (2) the welfare of the Commonwealth mandates a compulsory school attendance law; (3) rising costs place in jeopardy the ability of parents to carry the burden of nonpublic education as a major contribution to public welfare; and (4) operating and capital costs, if there were no nonpublic schools, would amount to $400,000,000 annually for operations and $1,000,000,000 for the construction of new facilities, and any substantial portion of those operating and capital costs would seriously jeopardize public education (App. 57a-58a).

The stated legislative purpose is clear and there can be no question at this juncture that the State has a pervasive and legitimate interest in the education of its citizens. " '[The State's] interest is education, broadly; its method, comprehensive. Individual interests are aided only as the common interest is safeguarded.' [citation omitted.]" *Board of Education of Central School Dist. No. 1 v. Allen*, 392 U.S. 236, 247 (1968); Pa. Const., Art. III, §14. Moreover, as this Court recognized in *Lemon v. Kurtzman*, 403 U.S. 602, 613 (1971), "A State always has a legitimate concern for maintaining minimum standards in all schools it allows to operate." The State has expressed its concern in enacting this legislation and its publicly expressed purpose must be afforded due deference. *Lemon v. Kurtzman*, supra, at 613; cf. *Everson v. Board of Education*, 330 U.S. 1, 6-7

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(1947). This is especially so where there is nothing in the record before this Court from whence a contrary conclusion could be drawn. A comparable point is made in *Allen*, supra, at 243, as follows:

> "* * * The express purpose of §701 was stated by the New York Legislature to be furtherance of the educational opportunities available to the young. Appellants have shown us nothing about the necessary effects of the statute that is contrary to its stated purpose. * * *"

B. The Primary Objective and Effect of the Act Are Economic and Not Religious

---

In 1970, 517,000 students were enrolled in nonpublic schools. Statistical Report of the Secretary of Education for the School Year ending June 30, 1971, Table 28. The total enrollment of pupils in public schools at the same time was 2,407,000. *Id.* Table II. When one considers that the total general fund expenses compiled from the annual financial reports of Pennsylvania school districts show the total cost per public school pupil in the school year 1970-71 to be $980.82 (*Id.*, Table 56) it must be acknowledged not only that a parent is performing a valuable service to the State by educating his child in a nonpublic school (for which he will receive under the Act a small amount in return for his service) but also that a tremendous financial burden would be placed on the State by the enrollment of a substantial number of nonpublic students in public

schools. It was this overriding consideration which led to the passage of the Act.

The overwhelming cost to the State of educating a substantial number of nonpublic school students in the public school system is a fact of record in this case. The uncontroverted legislative finding has determined that the financial burden to the State of undertaking such an effort would be approximately one and a half billion dollars. Assuming the State had the wherewithal to finance such a magnitudinous undertaking, it cannot be gainsaid that education throughout the State would suffer drastically during the period of transition.

A high estimate of the cost of the parent reimbursement program would be approximately 75 million dollars. When this amount is compared with the legislature's determination that the cost to the State of educating all nonpublic school students in public schools would be one and a half billion dollars, it can be seen that the Act constitutes a sound, economical means of saving the State vast sums of money and assures the continuation of equal educational opportunities for all school children in the Commonwealth.

Moreover, the means employed by the legislature to avoid this real and substantial economic burden is constitutionally sound.

A close scrutiny of the Act reveals that it is the best possible alternative to achieve the proper secular purpose of the Act (to save the State massive amounts of money) and to avoid any benefits to sectarian nonpublic schools except the most tangential and indirect

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ones. From decisions of this Court, this is precisely what the "primary effect" theory requires of all states to comply with the First Amendment. They must seek to serve a secular purpose and, in accomplishing this purpose, must use the alternative available which least benefits, tangentially and indirectly, the sectarian interests. See *Everson*, supra; *Allen*, supra; *Walz*, supra and *Tilton*, supra. This approach is more readily acceptable under the existing state of the law than that urged in Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 Yale L.J. 1205, 1322 (1970) where the author espouses: "The Court should intervene only on the basis of proof of an intention to favor or disfavor religion relative to nonreligion, or one religion relative to others."

The Act gives money to parents in the form of a tuition reimbursement. Payment is made only after the parent has paid tuition and only after the school year for which reimbursement is sought has passed. Payment is not made to the school, nor is there any requirement whatsoever placed on the parent to use the money received either to pay his child's tuition for the following year or to use it for any religious or nonreligious purpose.[2] There is no requirement that the parent continue to maintain his child in a non-

[2] The instant legislation bears witness to the care employed by the drafters. The legislature did not direct payments to be made directly to the school, nor did it give moneys to parents for transmittal to the school. Rather it employed a reimbursement program to secure the best possible means of effecting its purpose without at the same time advancing religion.

public school of any kind, be it sectarian or nonsectarian. The Act is designed to provide assistance to parents to enable them to maintain their program of using nonpublic schools.

The three-judge Court did not grasp the full significance of this act and therein lies its error. The Court concluded that "the effect of the Act is to aid the schools" (App. 51a) and that the failure to ensure that the reimbursement which the parent receives is restricted to use for nonreligious services or activities renders the Act unconstitutional. This is erecting a high wall indeed!

The three-judge Court observed: "If parents cannot afford to pay the tuition, they must take their child out of the nonpublic schools and if enough parents are unable to pay these costs, the schools will be forced to close" (App. 52a). The Court then stated, apparently contradicting its earlier finding that the Act had a valid secular purpose, that it was "precisely this possibility that led" to the enactment of this legislation (App. 52a). Firstly, the uncontroverted legislative findings belie this conclusion. Secondly, the Court has confused one possible effect with the "principal and primary effect."

The State's paramount concern was not the closing of nonpublic schools; it was avoiding "increased costs of public education" (App. 56a) by any significant shift of students from nonpublic to public schools, coupled with the serious general problem of inflation. Any tangential benefit which sectarian schools might derive from the effectuation of this overriding State interest is purely that: tangential,

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and nothing more. Most significant, however, is that the District Court completely distorts the meaning of the "principal and primary effect" test. Thus, the Court states that the principal and primary effect test does not mean that a Court is required to conclude that "the scheme of assistance will necessarily aid religion" (App. 49a). If principal and primary effect does not at least mean that much, then a poor choice of words has been employed in articulating this test.

The recent decision in *Wolman v. Essex*, 342 F. Supp. 399 (S.D. Ohio 1972) (three-judge District Court), aff'd sub nom. *Essex v. Wolman*, U.S. , 41 U.S.L.W. 3182 (October 10, 1972) warrants discussion. The case concerned a First Amendment attack on a section of an Ohio Statute which provided for educational grants to parents of children in nonpublic schools to reimburse them for a portion of the cost incurred by them in educating their children. The three-judge District Court found this legislative plan to be unconstitutional. Significantly, the Court, while it did discuss the principal and primary effect test (342 F. Supp. at 412-413), was unable to conclude that the principal and primary effect of the legislation was the advancement of religion. 342 F. Supp. at 413. The Court did find the enactment violative of the third prong of this Court's tripartite test for Establishment Clause questions namely that the legislation created an entangling relation between religion and the State.

There are several substantial differences between the Pennsylvania and Ohio Acts, and they are discussed in Part II of this brief. The point, however,

is that this Court, in summarily affirming that case did not even by implication pass on the merits of this case since the *Wolman* decision was not predicated upon the principal and primary effect test.

II. INCIDENTAL EFFECTS DO NOT CREATE UNCONSTITUTIONALITY BECAUSE OF ASSERTED RELIGIOUS BENEFITS ENTANGLEMENT AND DIVISIVENESS

A. Mere Benefits Incidentally Accruing to Religious Groups Are Immaterial

---

This Court has recognized repeatedly that the principal and primary effect test does not turn on whether a religious institution derives some benefit from a government program. Thus, the fact that one of the consequences of a given act may tangentially benefit religion is not determinative. For certainly in *Everson, Allen, Walz,* and *Tilton v. Richardson,* 403 U.S. 672 (1971), religious institutions derived some "aid". *Walz,* supra, at 670-673. As this Court made clear in *Tilton,* supra, at 679:

> "The crucial question is not whether some benefit accrues to a religious institution as a consequence of the legislative program, but whether its principal or primary effect advances religion."

In *Everson,* supra, this Court held that a New Jersey statute which authorized the spending of tax

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raised funds to pay the bus fares of parochial school pupils as part of a general program under which it paid the fares of pupils attending public and other schools did not violate the Establishment Clause. In reaching this conclusion, this Court recognized that the children and parents were the principal beneficiaries of the legislation even though the Church schools would derive some benefit from such a program: "It is undoubtedly true that children are helped to get to church schools. There is even a possibility that some of the children might not be sent to the church schools if the parents were compelled to pay their children's bus fares out of their own pockets when transportation to a public school would have been paid for by the state." *Id.* at 17. This Court did not deem such an ancillary benefit to the church schools to be controlling.

In *Allen,* supra, this Court held a New York law requiring school districts to purchase textbooks and loan them free of charge to students enrolled in church-related schools as well as in public and private schools to be consistant with the dictates of the Establishment Clause. Again, this Court recognized that the principal beneficiaries of the legislation were the students. *Id.* at 243. Again, this Court did not find controlling the possibility that the church-related schools might benefit from the program:

> "Perhaps free books make it more likely that some children choose to attend a sectarian school, but that was true of the state-paid bus fares in Everson and does not alone demonstrate an unconstitutional degree of support." *Id.* at 244.

Most recently, in *Tilton v. Richardson*, supra, this Court, in upholding the construction grant program for church-related colleges and universities under the Higher Education Facilities Act of 1963, recognized that construction grants "surely aid these institutions in the sense that the construction of buildings will assist them to perform their various functions." *Id.* at 679. Yet this factor did not persuade the Court that the principal and primary effect of the legislation was the advancement of religion.

As an alternative holding, the District Court below concluded that "the Act supports religion because it aids parents in providing a religious education for their children" (Appendix, p. 54a). But as this Court expressly recognized in *Everson* and *Allen*, the possibility that parents, might withdraw their children from nonpublic church-related schools because of a lack of the state assistance involved, does not in and of itself indicate that the principal and primary effect of the legislation was the advancement of religion.

B. No Entanglement Is Involved

The three-judge district Court, having concluded that the effect of the Act was the advancement of religion, did not formally determine whether the Act gave rise to an entangling relationship between religion and the State. However, implicit in the Court's determination was a recognition that there is no problem of "entanglement" with this legislation. Thus, the Court noted in a footnote that only if the

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Act included restriction on the use of the funds given to the parents would the State have to concern itself with avoiding excessive entanglement with religion in administering these restrictions (App. 52a, footnote 8).

The Act, of course, places no restrictions on what the parents may do with the funds they receive. In addition, Section 4 of the Act, unequivocally states that the Pennsylvania Parent Assistance Authority "shall exercise no direction, supervision or control over the policy determinations, personnel, curriculum, program or instruction or any other aspect of the administration or operation of any nonpublic school or schools" (App. 60a). It can be seen from the terms of the Act itself that it countenances no direct relationship between the funding authority and the nonpublic schools. Absent even a tangential relationship, it is impossible to conclude that the Act could give rise to excessive entanglement. Certainly the Reimbursement Program does not "encompass sustained and detailed administrative relationships for enforcement of statutory or administrative standards." *Walz*, supra, at 675.

C. Minimal Payments for Benefits Do Not Significantly Entail Political Disagreement on Religious Grounds

---

This Court has recently become concerned with the "divisive political potential" *(Lemon v. Kurtzman*, supra, at 622) of State programs which are attacked on Establishment Clause grounds and the

possibility of political division along religious lines. There is nothing in the Act itself or its history or in the record in this case which might suggest that such a potential exists here.

The fund from which a parent receives reimbursement under the terms of the Act is created by setting aside to the use of the Parent Assistance Authority a fixed percentage of the tax revenues collected by the Pennsylvania Department of Revenue pursuant to the Act of July 22, 1970, P. L. 513, Pa. Stat. Ann. Tit. 72, §3169.101, et seq. (Supp. 1972) known as the "Pennsylvania Cigarette Tax Act." Thus, the Parent Reimbursement Fund does not depend on annual appropriations. Moreover, payments to parents can be made only from that fund and from no other source (Section 4 of the Act, App. 60a). Section 9 of the Act (App. 62a) reinforces this point by providing that in the event there are insufficient monies in the Parent Reimbursement Fund to pay all the claims submitted by parents a proportionate amount would be paid to each claimant based on the total amount contained in the Fund. This is one striking difference between the Act and the legislation held unconstitutional in *Wolman v. Essex*, supra.

The Ohio Parent Reimbursement Plan provided that the amount of monies distributed to claimants could not exceed the specific appropriations made therefor by the Ohio General Assembly. Thus that program was fraught with the possibility of annual legislative and public debates on the proper size of the appropriation. That possibility does not exist here. Furthermore, the Ohio Reimbursement Pro-

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gram contained a provision which allowed the Ohio Board of Education to "determine" the amount of reimbursement for subsequent years and presumably to increase or decrease the amount of reimbursement. There is no such ongoing friction point in the Pennsylvania Act.

The Act thereby avoids the problem of political fragmentation on religious lines which this Court found to be present in the legislation found unconstitutional in *Lemon v. Kurtzman.* Here, this Court is not "confronted with successive and very likely permanent annual appropriations that benefit relatively few religious groups" 403 U.S. at 623. Rather, a percentage of the revenue collected pursuant to an ongoing collection process is diverted to create the Parent Reimbursement Fund.

Just as there is nothing in the Act itself to indicate that it is fraught with the potential for political divisiveness, neither is there anything in the record in this case to suggest it. As this Court recognized in *Tilton,* it is "difficult to document" those factors which might indicate that a given piece of legislation creates or increases the potential for divisive religious fragmentation in the political arena. 403 U.S. at 688. But this Court properly observed that the burden is on the party attacking the constitutionality of the legislation on this ground to point to "any continuing religious aggravation on this matter in the political processes." *Id.* Appellees herein have not pointed to anything which might remotely approximate divisiveness on religious lines.

III. CONCLUSION

The discussion of the constitutional standards in Establishment Clause cases have necessarily been treated separately in this brief for purposes of analysis. Yet, in determining the constitutionality of the Act, this Court must synthesize those tests and determine, on the whole, whether this Act is a law respecting the establishment of religion. The undisputed economic motivation of the Pennsylvania legislature and its mode of effectuation, examined in all aspects, are clearly secular in fact as well as in law. Accordingly, the Order of the Lower Court granting summary judgment to appellees should be reversed, and summary judgment should be directed in favor of the appellants.

Respectfully submitted,

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IN THE

Supreme Court of the United States

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MICHAEL RODAK, JR.,

October Term, 1972

No. 72-459

GRACE SLOAN, as State Treasurer of the Commonwealth of Pennsylvania

and

JOSE DIAZ and ENILDA DIAZ, His Wife, WILLIAM ZIMMERSPITZ and NANCY ZIMMERSPITZ, His Wife, F. CARL KRETZMANN and KATHERYN L. KRETZMANN, His Wife, ARTHUR HARVEY and MURIEL HARVEY, His Wife, DANIEL F. X. POWELL and ANNA T. POWELL, His Wife, SETH W. WATSON, JR., and ANNE P. WATSON, His Wife,
Appellants

v.

ALTON J. LEMON, NEAL F. BRACKEN and BENJAMIN S. LOWENSTEIN, *Appellees*

October Term, 1972

No. 72-620

HENRY E. CROUTER, *Appellant*

v.

ALTON J. LEMON, NEAL F. BRACKEN and BENJAMIN S. LOWENSTEIN, *Appellees*

BRIEF FOR AMICUS CURIAE, CITY OF PHILADELPHIA

On Appeal from the United States District Court for the Eastern District of Pennsylvania.

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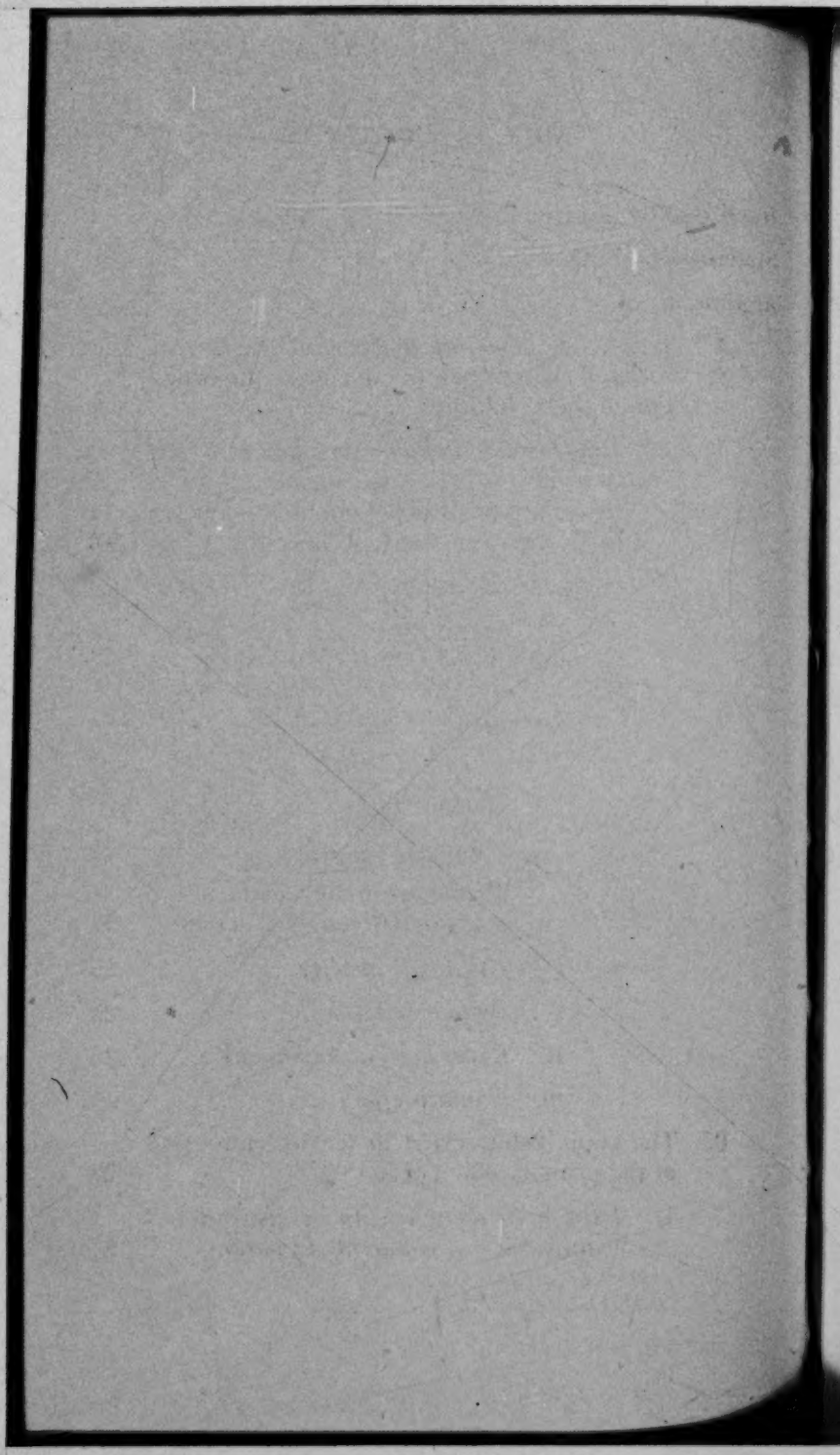

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INTEREST OF THE AMICUS

This brief is submitted on behalf of the City of Philadelphia, Commonwealth of Pennsylvania which has a population in excess of 1.9 million persons. Philadelphia has a public school population of 261,000 students, and a nonpublic school population of 142,000 students (54% of the public school population).[1] This brief is sponsored by City Solicitor Martin Weinberg, Esquire, the authorized law officer of Philadelphia.

This brief is submitted by your *amicus*, City of Philadelphia, in order to impress upon your Honorable Court the urgency and gravity of the adverse effects of the decision of the court below, on the City of Philadelphia, its nearly 2 million inhabitants, especially, and also on their fellow citizens in Pennsylvania and the nation. Philadelphia respectfully urges this Court to uphold the constitutionality of Act No. 92 of the General Assembly of the Commonwealth of Pennsylvania Act of August 27, 1971, P.L. —, 24 P.S., Sec. 5701, *et seq.*, known as the "Pennsylvania Parent Reimbursement Act for Nonpublic Education."

The act provides for partial reimbursement[2] of tuition paid by Pennsylvania parents for the education of their children in nonpublic schools. Approximately 35% of Philadelphia school children attend nonpublic schools.

On July 21, 1972, a three-judge constitutional court in the Eastern District of Pennsylvania, declared the Act unconstitutional and issued an Order perpetually enjoining disbursements to parents under the Act.[3]

Payments exceeding $10,000,000 have therefore been delayed to Philadelphia parents of nonpublic school children. Timely appeals have been filed on behalf of certain parents, parties below, and the Commonwealth of Pennsylvania.

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1. Attendance figures for school year ending June, 1972.
2. Up to $75 per child in elementary school; up to $150 in secondary school.
3. Lemon v. Sloan, 340 F. Supp. 1356 (E.D. Pa. 1972).

This Court, in an order dated January 22, 1973, noted probable jurisdiction.

The enormous financial and administrative burdens upon the taxpayers of Philadelphia, as well as the incalculable losses in terms of human rights and civil peace, are staggering.

Should all or any substantial number of parents, whose children now attend nonpublic schools, be forced to succumb to this increasingly heavy financial burden of supporting two educational systems, the results would be tragic for parents all over America, but especially those living in Philadelphia and other great urban centers. Some of the major consequences, if this Court fails to permit the implementation of Act 92, are as follows:

1. The "enormous added financial, educational and administrative burden" recognized by the Commonwealth in its legislative findings[4] falls most heavily upon the City of Philadelphia, the largest urban center in the state. As such, the City is forced to contend with the concentrated and interrelated problems which characterize urban centers throughout the nation at this point in history. Pointing out that nonpublic school attendance is largely an urban phenomenon, the Report of the President's Commission on School Finance[5] declared:

> "One of every 10 American children attends a nonpublic school; the proportion is much higher in urban areas where the nonpublic school is a much more significant part of American education than it is in the Nation as a whole. Roughly 83 percent of all nonpublic school children are found in what are known as Standard Metropolitan Statistical Areas

4. Act of General Assembly of Pennsylvania of August 27, 1971, No. 92, P.L. —, 24 P.S. Sec. 5702 set forth in 340 F.Supp. 1356, 1366.

5. *Schools, People, and Money, The Need for Educational Reform*, Final Report, PRESIDENT'S COMMISSION ON SCHOOL FINANCE, March 3, 1972, U.S.G.P.O. Stock No. 1780-0965, p. 54 [hereinafter cited as COMMISSIONS FINAL REPORT].

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(the cities and their suburbs), and nearly half (47.5 percent) of all nonpublic children attend schools in center cities. Of the total elementary and secondary school enrollment in our 10 largest cities, 24.6 percent is found in nonpublic schools.

"It is apparent that nonpublic education is largely an urban phenomenon. Inner city non-public schools—mainly Roman Catholic, but also Lutheran in many areas—provide a substantial part of the total investment in urban education. And where their existence is threatened by financial and other problems, our cities must confront the prospect of assuming the additional burdens of educating non-public children."

The prospect facing the City of Philadelphia at the present moment is grave. The transfer of the City's non-public school children to the public schools would create a 54% increase in the student population of the public schools. The corresponding increase, expressed in dollars at 199,765,872 in public school *operational* expenditures alone, would be a staggering blow to the City's taxpayers.[6] These additional expenditures have been estimated for the current fiscal year at $12 million if 10% of the students transfer, and at $153 million if all transfer. The latter figure is projected at $215 million for fiscal year 1974-75.[7]

6. The current operating budget for Philadelphia Public Schools is $369,936,800, a figure which has just been increased, as a result of a teachers' strike in an amount exceeding $98,000,000 over the next four years.

7. *See* REPORT OF THE ARCHDIOCESAN ADVISORY COMMITTEE, FINANCIAL CRISIS OF THE CATHOLIC SCHOOLS (1972). A nonsectarian committee composed of thirty leading citizens of the Philadelphia area, and representing business, labor, government, education and the community at large, published a voluminous report on the Financial Crisis of Catholic Schools in Philadelphia and Surrounding Counties. This report, popularly known as the "Gurash Report" after its Chairman, John T. Gurash, Board Chairman and Chief Executive Officer of the Insurance Company of North America, contains a vast amount of data concerning the financial crisis in Catholic

2. Massive transfers of students from nonpublic to public schools would create educational chaos. Even if the huge financial problem could be solved, the public schools, already struggling under the effort to educate a quarter of a million students, and, in the process, turning out far too many functional illiterates, would find it impossible to supply the facilities and the trained personnel to provide adequate education, within a reasonable time, to an additional 140,000 students. The inevitable effect will be substantial deterioration in the quality of education for all of the children of Philadelphia demanding a further investment of money and people of an incalculable amount.

3. A massive increase in taxes for educational purposes will produce extremely serious strains on the City's budget for all other municipal purposes. The City of Philadelphia, like the School District, both of whom must look to the same base of taxpayers living or doing business in Philadelphia for their financial means, already faces major deficits in each of its operating budgets. These deficits are the inevitable result of a diminishing tax base, which is itself due to the vicious circle of urban decay. Urban blight reduces the real estate tax base while at the same time necessitating rising tax rates in order to fight the

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Note 7—*Continued*

and public education today. The following figures indicate the estimated additional taxes which would be required to meet the additional operating costs* which would have to be met by the public schools of Philadelphia reflecting varying rates of transfer of substantial numbers of nonpublic school children to the public schools. The figures have been estimated for the current and succeeding two fiscal years; rates of student transfer are expressed as percentages of the existing Philadelphia nonpublic school population, and the amounts involved reflect millions of dollars.

Fiscal Year	10%	25%	50%	100%
1972-73	$12 million	30	60	153
1973-74	26 million	60	115	175
1974-75	46 million	98	176	215

*Capital expenditures constitute a huge addition to these sums. *See* 24 P.S. Sec. 5702(4).

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urban blight and the steady increase in crime arising therefrom, thus generating flight of industry and affluent taxpayers from Philadelphia and thereby reducing the tax base still further. These conditions, demanding steadily greater expenditures by the City, also make collection of the necessary funds more and more difficult because of diminishing realty values and loss of *in personam* jurisdiction over taxpayers. The action of the lower court, in striking down Act No. 92, a statute designed, *inter alia*, to prevent the addition of an "enormous burden" upon all the taxpayers, including those exercising educational freedom of choice, if not reversed, will contribute immensely to this vicious circle.

4. The forced transfer of large numbers of children from nonpublic to public schools will result in incalculable damage to the entire community in terms of human rights and the public peace.

(a) The creation of a monolithic public school system will further depreciate the quality of education by eliminating the only effective competition which serves as a spur to educational achievement.

(b) If student populations are swollen by the enforced addition of thousands of children whose parents believe in philosophical, theological and other ideological values differing substantially from those traditionally inculcated by the secular public schools, these public schools will be wracked with divisiveness by the efforts of each group to persuade or compel the school authorities to adopt educational policies consistent with each group's own deeply held values.

(c) The invalidation of Act No. 92 will strike down legislation designed to protect and encourage the constitutionally protected right of parents to choose the system of education they desire for their children. The precious right of parents to choose the system and teachers to whom they will entrust an important part of that education will be severely restricted so that only the rich will be able to exercise this invaluable civil right, all others being

forced to accept the state mandated educational philosophy offered by the state controlled schools. In Philadelphia, where, under difficult financial conditions, the parents of 140,000 children are still able to exercise this right, the loss of this freedom by so many of its citizens will be an incalculable loss of human rights to which this Court cannot be indifferent.

All of the results set forth above will have a serious harmful effect upon the entire community. For the purpose of this brief, however, your *amicus* will not dwell at length upon the massive economic effects, but will focus its attention upon the serious consequences with regard to human rights and the public peace set forth in paragraph 4, *supra*.

It is of grave note that Philadelphia, since this appeal, has been the scene of one of the most protracted strikes by public school teachers ever witnessed in this nation. The strike lasted ten weeks. The cost of settling the strike, in terms of labor costs alone, was $98,000,000, and the irreplaceable loss to the children and the psychological impact of the strike upon the community is incalculable. Leaders of organized labor throughout the City and across the nation rallied to the support of the teachers, going so far as to call for a city-wide general strike by all organized labor, which was averted at the last minute by the settlement of the teachers' strike. The 140,000 nonpublic school children were not directly affected by the strike, a fact which drastically reduced the impact of the strike upon the community.

Should a substantial number of the parents of nonpublic school children be compelled, by the increasing pressures of inflation aggravated by the spiraling increase in taxation, to withdraw their children from the nonpublic schools, and to transfer them to the entirely publicly supported public schools, the resulting impact upon the people of Philadelphia in terms of the loss of educational quality, drastically reduced freedom of educational choice, and steeply increased taxes will be unbearable.

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Therefore, your *amicus*, City of Philadelphia has a vital stake in the matter presently before this Court. This brief is submitted in an effort to convince this Court of the importance and the necessity for upholding the Act in question and thereby preserving the people of Philadelphia from the immense evils which will result in the future if the decision of the court below is not reversed.

STATEMENT OF THE QUESTION

Whether Pennsylvania may provide necessary financial assistance to protect the fundamental constitutional right of educational freedom of choice by parents for their children where economic pressures deprive parents of that freedom?

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ARGUMENT

A. The Act is designed to preserve the constitutional right of parents to choose the education of their children.

1. *Educational Freedom of choice in perspective*

The decision of this Court in this case will have much to do with whether or not freedom of choice in education will remain an economically feasible alternative for any but the very rich.

Just a half century ago, in 1922, a statute was enacted in Oregon, which, if it had been allowed to stand, would have destroyed every nonpublic school, created a monolithic public school system, and wiped out the parental right to choose the educators of their children. The act, by its terms, compelled all children to attend the public schools. This Court, in a unanimous opinion,[8] struck down that legislation and vindicated the profoundly important right of parents to control and direct the education of their children.

Fifty years later, in *Wisconsin v. Yoder*,[9] this Court again had reason to vindicate the "primary role of parents in the upbringing of their children," a matter which the Court declared, "is now established beyond debate as an enduring American tradition."[10]

Today, the right of parents to direct the religious education of their children is again under attack. This time, however, the threat comes not from a misguided legislature seeking to compel civil unity by coercive legislation, but rather from a well-meaning judiciary which, in its efforts to guard against possible dangers to the principle of church-state separation, has become insensitive to the compelling demands of educational freedom of choice.

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8. Pierce v. Society of Sisters, 268 U.S. 510 (1925).
9. — U.S. —, 32 L. Ed. 2d 15 (1972).
10. Id., at —, 32 L. Ed. 2d at 35.

The vital importance of the parental right has been well stated in *Pierce* and by Mr. Chief Justice Burger in *Yoder*:

". . . this case involves the fundamental interest of parents, as contrasted with that of the State, to guide the religious future and education of their children. The history and culture of western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition. If not the first, perhaps the most significant statements of the Court in this area are found in *Pierce v. Society of Sisters*, in which the Court observed:

'Under the doctrine of *Meyer v. Nebraska*, 262 U.S. 390, (67 L Ed 1042, 43 S Ct 625, 29 ALR 1446), we think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control. As often heretofore pointed out, rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the State. The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.' 268 US, at 534-535, 69 L Ed at 1078.

The duty to prepare the child for 'additional obligations,' referred to by the Court, must be read to include the inculcation of moral standards, religious beliefs and elements of good citizenship . . . the

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Court's holding in *Pierce* stands as a charter of the rights of parents to direct the religious upbringing of their children."[11]

This profoundly important right of parents to choose the educators of their children, can be violated, of course, not merely by coercive legislation such as that which was attempted in *Pierce*, but also by a combination of forces in the form of massive economic pressures, in part generated by the fiscal policies of government, itself (at all levels), coupled with a failure upon the part of government to take the necessary steps to prevent the destruction of those nonpublic institutions which provide the only alternative for the exercise of the parental right.

a) *The jeopardy of nonpublic schools*

That these institutions are in danger, indeed, rapidly decreasing in number, with the resulting diminution of the possibility of parental choice, has been made abundantly clear by President Richard Nixon in his report to the Congress on March 3, 1970, where he reported that, in the previous two years, close to a thousand nonpublic elementary and secondary schools had closed.[12] Subsequently, the President's Commission on School Finance, in its Final Report, pointed out the importance of nonpublic schools, in which one tenth of America's children are educated, and warned:

> "And where their existence is threatened by financial and other problems, our cities must confront the prospect of assuming the additional burdens of educating nonpublic children."[13]

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11. *Id.*

12. "Education Reform: The President's Message to the Congress Proposing a Series of Actions to improve Elementary and Secondary Education. March 3, 1970", *Weekly Compilation of Presidential Documents*, Vol. 6, No. 10, Monday, March 9, 1970, at p. 312.

13. *See* COMMISSION'S FINAL REPORT at 54.

The detriment to the public interest, which the Commission recognized as flowing from the loss of these schools is set forth in Chapter IX of the Final Report.

The attention of the Court is also directed to the report of Alan Pifer, president of the Carnegie Corporation of New York, entitled "The Jeopardy of Private Institutions,"[14] in which the author tells us that:

> ". . . a high proportion of our private educational, cultural, health, and welfare institutions are heading into deep trouble, increasingly affected by social and economic forces they are powerless to withstand. The steady, unrelenting deterioration of their position has now, for the first time, raised doubts about the continued viability of our traditional system of shared responsibility between public and private endeavor."[15]

b) *The importance of diversity*

Mr. Pifer made it very clear that, in his discussion of public and private institutions, he was not suggesting that possibly one or the other should be the exclusive vehicle in its field—a concept lacking "even a semblance of validity within this nation's experience." He then posed the following question:

> ". . . whether, in the aggregate, private institutions provide an essential element to the character of our national life [?]"[16]

Replying in the affirmative, the author sets forth four principal reasons why we should not permit these institutions to disappear: (1) they provide an opportunity for private effort for the public welfare; (2) their role in the "safe-guarding of academic, professional and artistic free-

14. Pifer, A., *The Jeopardy of Private Institutions*, reprinted from THE 1970 ANNUAL REPORT, CARNEGIE CORPORATION OF NEW YORK.

15. *Id.*, at 3.

16. *Id.*, at 5.

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dom" and protection of "liberty of mind and conscience"; (3) their role in providing services which government could not supply, particularly religious services; and (4) their contribution to our national life of "vital elements of diversity, free choice, and heterodoxy."[17] He then proposes various

17. *Id.*, More specifically, the author states:

"A fourth and perhaps most important reason private institutions must not be allowed to decline is that they bring to our national life vital elements of diversity, free choice, and heterodoxy. These qualities are often lumped together and their identity obscured in celebration of the vague and rather overworked concept of 'pluralism.' But each, in fact, has a quite different connotation, and each has its own special importance.

"Diversity suggests the existence of a variety of institutions within a given field, all rather different from one another in the way they are managed, in their perceptions of priorities, and in the kinds of service they offer. The term is value-free in that it contains no suggestion of superiority or inferiority. It says only that there are likely to be a number of ways to accomplish something and that in the long run the competition between several possible approaches is good for everybody. This prevents new ideas from being suppressed, it provides challenge to fat and complacent bureaucracies, it assures experimentation and flexibility, and it lends color to what might otherwise be a monochromatic scene.

"Free choice applies to the consumer rather than to the purveyor of services. It implies the existence of a market, wherein those seeking services can shop around and take their trade where they choose. The market is, of course, not an entirely free one because the costs of private services are likely to be higher than those provided by public institutions. But the existence of the market is, all the same, important to the way the consumer feels about his life, for he knows that if a massive public agency whose services he was using were to become rigid, or inhumane, he would at least have the possibility of an alternative.

"Heterodoxy describes the permitted presence in a society of unconventional ideas and philosophies and of institutions and organizations which nourish them. Tolerance of this kind is a sign of national maturity and self-confidence and indicates faith in the good sense of the average citizen to sort out what is genuine and what specious. It also recognizes that today's

remedies including "public subsidization of the consumers" (not the institutions), a form of aid having the advantage

> "that it reduces the likelihood of government control of the operations of private institutions and preserves the free market."[18]

This latter advantage is precisely the advantage which inheres in the parent reimbursement plan provided in Act 92. The Act eliminates governmental control (excessive entanglement) and it preserves the free market (parental choice). Therefore, by subsidizing the parent, rather than the school, the Act would preserve the values sought to be protected by *both* of the Religion Clauses in the First Amendment.

The importance of diversity to the American way has been well expressed by President Nixon in his message to the Congress on March 3, 1970, when he declared:

> ". . . The non-public elementary and secondary schools in the United States have long been an integral part of the nation's educational establishment—supplementing in an important way the main task of our

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Note 17—*Continued*

iconoclasm may, as the result of changing conditions, be tomorrow's orthodoxy and that any attempt forceably to stifle the free play of ideas, however seemingly eccentric, may produce stagnation or cause the build-up of powerful social forces that will eventually result in violent upheaval. Thus, the capacity to tolerate nonconformism, trying as this sometimes becomes, is the *sine qua non* of a free society. Without it, the imposition of a totalitarian state ultimately becomes inevitable.

"Private institutions are not the only contributors to pluralism. Public institutions can and do play a part in it; but their vulnerability in times of crisis places a special burden on private institutions for the preservation of diversity, of free choice, and of the capacity to tolerate heterodoxy—in short, for the preservation of an open society."

18. *Id.*, at 14.

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public school system. The nonpublic schools provide a diversity which our educational system would otherwise lack. They also give a spur of competition to the public schools—through which educational innovations come, both systems benefit, and progress results.

Should any single school system—public or private—ever acquire a complete monopoly over the education of our children, the absence of competition would neither be good for that school system nor good for the country. The non-public schools also give parents the opportunity to send their children to a school of their own choice, and of their own religious denomination. They offer a wider range of possibilities for education experimentation and special opportunities for minorities, especially Spanish-speaking Americans and black Americans. . . ."[19]

Similarly, the value of pluralism as a safeguard for civil rights was recognized by "The Federalist" two centuries ago:

"In a free government the security for civil rights must be the same as that for religious rights. It consists in the one case in the multiplicity of interests, and in the other in the multiplicity of sects."[20]

And see the prescient remarks of John Stuart Mill, in his classic essay "On Liberty,"[21] where, after discussing the "objections which are urged with reason against State education," he nevertheless urges that education be made compulsory, but warns against a State monopoly or near monopoly and of the importance of educational diversity.

"Were the duty of enforcing universal education once admitted, there would be an end to the difficul-

19. See note 12, *supra*.

20. *Cited in* W. DOUGLAS, FREEDOM OF THE MIND 11 (Doubleday & Co., Inc., Garden City: N.Y.) (1964).

21. J. S. MILL, ON LIBERTY 128-132 (World's Classics ed., Oxford University Press: London) (1940).

ties about what the State should teach, and how it should teach, which now convert the subject into a mere battle-field for sects and parties, causing the time and labour which should have been spent in educating, to be wasted in quarrelling about education. If the government would make up its mind to *require* for every child a good education, it might save itself the trouble of *providing* one. It might leave to parents to obtain the education where and how they pleased, and content itself with helping to pay the school fees of the poorer classes of children, and defraying the entire school expenses of those who have no one else to pay for them. *The objections which are urged with reason against State education, do not apply to the enforcement of education by the State, but to the State's taking upon itself to direct that education: which is a totally different thing. That the whole or any large part of the education of the people should be in State hands, I go as far as any one in deprecating. All that has been said of the importance of individuality of character, and diversity in opinions and modes of conduct, involves, as of the same unspeakable importance, diversity of education.* A general State education is a mere contrivance for moulding people to be exactly like one another: and as the mould in which it casts them is that which pleases the predominant power in the government, whether this be a monarch, a priesthood, an aristocracy, or the majority of the existing generation in proportion as it is efficient and successful, it establishes a despotism over the mind, leading by natural tendency to one over the body. An education established and controlled by the State should only exist, if it exist at all, as one among many competing experiments, carried on for the purpose of example and stimulus, to keep the others up to a certain standard of excellence. Unless, indeed, when society in general is in so backward a state that it could not or would not provide for itself any proper institutions of education,

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unless the government undertook the task: then, indeed, the government may, as the less of two great evils, take upon itself the business of schools and universities, as it may that of joint-stock companies, when private enterprise, in a shape fitted for undertaking great works of industry, does not exist in the country. But in general, if the country contains a sufficient number of persons qualified to provide education under government auspices, the same persons would be able and willing to give an equally good education on the voluntary principle, under the assurance of remuneration afforded by a law rendering education compulsory, combined with State aid to those unable to defray the expense."[22]

In America, more than a century later, we are slowly beginning to realize the wisdom of John Stuart Mill. Already the development which he deprecated has occurred as we see that a "large part of the education of the people" is in State hands. The people are beginning, however, to awaken to the danger of a state educational monopoly,[23]

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22. *Id.*, at 129-130 (Emphasis supplied except for single words).

23. *See, e.g., The Disadvantaged Poor: Education and Employment*, U.S. CHAMBER OF COMMERCE TASK FORCE ON ECONOMIC GROWTH AND OPPORTUNITY; U.S. Chamber of Commerce Catalogue No. 66-29037 (1966). This Report recommended government financial support for the education of all children, including support for private education as an alternative to public education. The Task Force based its recommendation upon the values of parental freedom of choice, the avoidance of governmental monopoly and the value of diversity and competition. Putting forth "the notion that government should not have a monopoly on publicy financed schooling", the Report said:

"Lack of competition eliminates (the) ceaseless pressure for progress. And, as a result, public schools are less vigorous than they could be.

"The second observation in support of our conclusion is based on the virtues of diversity. It is our conviction that no single collection of men, however competent and however

and legislatures are beginning to fashion ways and means[23] whereby the fast dwindling freedom of the people may be preserved.

It should be clearly understood that the City of Philadelphia is not proposing to dismantle the public schools. The danger is not in public schools, but in the monopoly, the lack of choice.[23] In fact the two large systems, public and nonpublic, in Philadelphia are in agreement concerning the necessity to work for the joint solution of their common problems and have formed a joint committee of the two school boards for this purpose. In a joint statement issued

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Note 23—*Continued*

dedicated, can exhaust the worthwhile possibilities in a given subject matter. Diverse groups, each pursuing institutional or personal self-interest or even selflessly working in a variety of intellectual climates, are more likely to produce divergent ideas than any monolith, no matter how tolerant. We take this diversity for granted in scholarship, in politics, and in the abundance and variety of the commercial marketplace. Why should we settle for the single choice in education?

"And finally, a strong bias in favor of free choice and maximum satisfaction of individual preferences underlies our conclusion. As an intrinsic matter, we think it desirable that parents should have a choice of schools for their children. Educational philosophies differ. Different schools, none of them perfect, will have different combinations of strengths and weaknesses. Parents—should be able to choose among them—Americans take their freedom for granted in planning college or university educations; relatively well-off Americans and members of some religious groups exercise the same choice for their children at the secondary-school level and sometimes before. Why should we settle for less for the great majority of Americans at the primary and secondary levels?" pp. 63 and 69.

23a. See Exhibit C in brief for appellant, Henry E. Crouter, at p. 60-61, showing programs in 32 states and the District of Columbia.

23b. For comments reflecting the role of public schools in a pluralist society see note 17, *supra*, last paragraph, and J. S. Mill's comment, *supra*, p. 16, recommending public schools as a "one among many competing experiments."

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by the two boards on November 24, 1969, they recognized their mutual dependence and agreed to work together to secure the public funds "necessary to provide essential educational services for all the children of Philadelphia."[24]

2. *Act 92 in perspective*

Act 92 of the Commonwealth of Pennsylvania represents one of the most recent legislative efforts to alleviate the potentially devastating financial burden on all of the taxpayers and to perpetuate parental freedom of choice in the education of their children.

Act 92 expressly sets forth the following legislative findings of fact:

> ". . . (3) In the exercise of their constitutional right to choose nonpublic education for their children, parents who support such education make a major contribution to the public welfare. However, the immense impact of inflation, plus sharply rising costs of education, now combine to place in jeopardy the ability of such parents fully to carry this burden.
>
> (4) Should parents of children now enrolled in nonpublic schools be forced by economic circumstances to transfer any substantial number of their children to public schools, an enormous added financial, educational and administrative burden would be placed upon the public schools and upon the taxpayers of the State. Without allowance for inflationary increase, the annual operating cost of educating in public schools, the five hundred thousand students now enrolled in Pennsylvania's nonpublic schools would be an additional four hundred million dollars ($400,000,000). Necessarily added capital costs to

24. Joint statement by Richardson Dilworth, President, Board (Philadelphia) of Education; William D. Valente, President, Archdiocesan Board of Education; Rt. Rev. Msgr. Edward T. Hughes, Superintendent, Archdiocesan Schools; Dr. Mark R. Shedd, Superintendent, Philadelphia Public Schools. November 24, 1969.

construct new facilities or acquire existing facilities would be in excess of one billion dollars ($1,000,000,000). Any substantial portion of these operating and capital costs would be an intolerable public burden and present standards of public education would be seriously jeopardized. Therefore, parents who maintain students in nonpublic schools provide a vital service to the Commonwealth."[25]

Act 92, the Pennsylvania Parent Reimbursement Act for Nonpublic Education, was enacted by the General Assembly and signed into law by the Governor, in 1971, as a direct response to the ruling of this Court in Lemon v. Kurtzman, 403 U.S. 602 (1971), invalidating a previous Act[26] of the Pennsylvania legislature. The legislative goals in each case were the same, but the method selected was fundamentally different. The goals were these: To secure the constitutionally protected right of parents to choose the educators of their children and, at the same time, to prevent the imposition of a massive burden upon the already overburdened public schools and the taxpayers who support them, by helping to prevent massive forced transfers of nonpublic school children. In this way, the law makers in each case sought to foster educational opportunity for all of the children in the Commonwealth.

The method selected, however, is, from a constitutional standpoint, fundamentally different. In the earlier Act, the law provided for the purchase of educational services, in the form of instruction in so-called "secular subjects", through contracts between the State Department of Education and the nonpublic schools. This Court, though agreeing that the goals were lawful, found that the method

25. 24 P.S. Sec. 5702(3) and (4) set forth in 340 F. Supp. 1356, at 1366.

26. Nonpublic Elementary and Secondary Education Act of 1968, June 19, Pa. Stat. Ann. Tit. 24 §5601 *et seq.* (Supp. 1969). The complete text of the statute appears in Appendix A to the opinion of the Court below, 310 F. Supp. 35, 55-58 (E.D. Pa. 1970). The Act is also known as Act 109.

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of contracting, with its concomitant system of regulations and controls designed to ensure the "secularity" of the instruction, constituted such an excessive entanglement of government and religious institutions that it could not survive the constitutional test.

Relying on this Court's decision in *Lemon v. Kurtzman*, the Pennsylvania legislature enacted the statute now before the Court. The new statute avoided the fatal "excessive entanglement" by subsidizing the parent, rather than the school, and by forbidding any State involvement between government and the schools. The new law, therefore, was carefully shaped to meet the requirements laid down by this Court. Your *amicus* believes that the lawmakers were successful in their effort to comply with the constitutional criteria spelled out by this Court, and was troubled when the local federal court declared the new Act to be in violation of the Establishment of Religion clause of the First Amendment of the United States Constitution.[27] We believe that the lower court was in error and, for the reasons set forth below, we urge this Court to reverse that decision and preserve the legislation here in question.

3. *Act 92 violates neither the policy underlying the Establishment Clause nor the constitutional criteria laid down by this Court.*

a. *Policy*

The Act successfully avoids "the three main evils against which the Establishment Clause was intended to afford protection: Sponsorship, financial support, and the active involvement of the sovereign in religious activity."[28]

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27. 340 F. Supp. 1356.

28. *See* Lemon v. Kurtzman, 403 U.S. 602, 612 (1971), (Burger, C.J.), *citing* Walz v. Tax Commission, 397 U.S. 664, 668 (1970).

i) "Sponsorship": Nothing in Act 92 can be construed as sponsoring any religion or religious institution. The benefits are available to all parents who choose to educate their children in schools other than public schools, without regard to whether the school chosen by the particular parent is church related, religiously oriented, sectarian or non-sectarian. If a parent chooses to send his child to a public school, his tuition is subsidized totally; if he chooses, pursuant to his constitutionally protected right[29], a nonpublic school, his tuition is subsidized, at least in part, by the tuition reimbursements provided under the Act. There is no sponsorship by the state of any religion or any school, religious or otherwise. The choice, the selection, of the particular institution to be patronized is left entirely to the free choice of the parent-citizen, and is in no way influenced by the state. That which is favored by the state is not a religion, not a school, but rather freedom—the freedom of the parent to choose the teachers of his children.

ii) "Financial support": There is nothing in Act 92 which would provide any financial support for religion or for any religious institution. What is supported, here, is the parent's civil right to exercise his freedom of choice in education. The basic error, which resulted in the decision of the court below to strike down this Act, was the failure to recognize the significance of this fundamental civil right. Instead, the court considered the parent to be a mere conduit[30] through which public funds would be channelled to religious institutions. This insensitivity to the rights of the parents and the implications of the Free Exercise Clause, coupled with an excessive preoccupation with the Establishment Clause, has produced the kind of rigidity which, in the words of Chief Justice Burger, "could well defeat the basic purpose" of the Religion Clauses:

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29. For a discussion of the vital matter of parents' rights to choose the educators to whom they will entrust the formal education of their children, *see* pp. 9-19 *supra*.

30. 340 F.Supp. at 1364.

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> "The course of constitutional neutrality in this area cannot be an absolutely straight line; rigidity could well defeat the basic purpose of these provisions, which is to insure that no religion be sponsored or favored, none commanded, and none inhibited. The general principle deducible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference."[31]

Under Act 92, no religion is sponsored or favored, none is commanded, and none inhibited. The parent is left free to decide for himself whether he will choose public or nonpublic schools for his children. If he chooses the public school, he is subsidized by the public funds spent directly by the school authorities; if he chooses nonpublic schools, he is still subsidized, but by reimbursement for tuition costs. If there is any sponsorship here, any favoring of one choice over another, the favored choice is the public school, where the subsidy covers the full cost, rather than the nonpublic choice which results in only a partial subsidy, with the parent sustaining the balance of cost from his own pocket.

Further, in the event the parent selects a non-public school, the subsidy, the reimbursement of tuition, is not in any way affected by the circumstance that one parent might choose a sectarian school while another would choose a nonsectarian school; nor is there any difference in effect upon the parent's right to reimbursement if he chooses a Catholic school or a Jewish school. In every case, the right to reimbursement within the statutory limitations as to amount is the same. Furthermore, Act 92,

31. Walz v. Tax Commissioner, 397 U.S. 664, 669 (1970).

does not inhibit any religion or religion generally. Treating all parents of nonpublic school children alike, the Act does not tend to discourage any parent in the exercise of his freedom of choice by making one kind of nonpublic school less desirable than another. If there is any inhibition or discouragement here, it is to be found, not in the Act, which seeks to correct a long standing inequity, but rather in the action of the court below, which, by its rigid adherence to the Establishment concept and its insensitivity to the Free Exercise concept[32] has thrown a major inhibition in the path of parents bent upon the enjoyment of the constitutionally protected right of freedom of choice in education.

iii) Act 92 also avoids the third evil: "The active involvement of the sovereign in religious activity." Section 4 of the Act expressly forbids the Parent Assistance Authority, the agency charged with administering the funds, to exercise any control over any school.[33] The schools, of course, are subject to appropriate regulation and control in connection with those standards which the state has the right to impose, *Lemon*, (403 U.S. at 613), but all such controls are imposed by other state laws, not here in question. The absence of such involvement was recognized by the court below and by counsel for the plaintiff-appellees[34] and the court made no mention of entanglement in its opinion.

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32. *Cf.* Sherbert v. Verner, 374 U.S. 398, 413, 414 (1963) (Stewart, J., concurring).

33. Act 92, 24 P.S. Sec. 5704, states:

> "Pennsylvania Assistance Authority.—There is hereby created a body corporate and politic to be known as the Pennsylvania Parent Assistance Authority . . . The Authority shall have power to make and promulgate rules and regulations for the administration of this Act: Provided, however, that it shall exercise no direction, supervision or control over the policy determinations, personnel, curriculum, program of instruction or any other aspect of the administration or operation of any nonpublic school or schools."

34. Notes of Hearing, dated February 23, 1972, at page 65, where Mr. Mann said: "No, there is no administrative entanglement in this law."

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b. *Constitutional criteria*

Despite the fact that Act 92 was carefully designed to meet the constitutional tests laid down by this Court, the court below, as a result of a series of errors, declared the Act invalid and forbade any payments to parents under the law.

The court below restated[35] the three tests which this Court has developed for determining whether a particular program offends the Establishment Clause.

> "* * * First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, Board of Education v. Allen, 392 U.S. 236, 243, 20 L.Ed.2d 1060, 1065, 88 S.Ct. 1923 (1968); finally, the statute must not foster 'an excessive government entanglement with religion.' Walz, *supra*, at 674, 25 L.Ed.2d at 704."[36]

i) *Secular purpose*

Applying the first test, the court below found that:

> "the stated legislative purpose of the Act is to aid parents to continue to send their children to nonpublic schools thereby fostering educational opportunities for both public and nonpublic school children."[37]

and concluded that

> "the Act expressed a legitimate secular objective consistent with the Establishment Clause."[38]

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35. 340 F.Supp. at 1360.

36. Lemon v. Kurtzman, 403 U.S. 602, 612-613 (1971), citing Board of Ed. v. Allen, 392 U.S. 236 (1968).

37. 340 F.Supp. at 1360.

38. Id. at 1360 (Citing *Allen, Lemon v. Kurtzman, and Tilton).* Tilton v. Richardson, 403 U.S. 672 (1971).

In reaching this conclusion the court discussed briefly the remarks of this Court in *Lemon v. Kurtzman*, where this Court declared:

> "Inquiry into the legislative purposes of the Pennsylvania and Rhode Island statutes affords no basis for a conclusion that the legislative intent was to advance religion. On the contrary, the statutes themselves clearly state that they are intended to enhance the quality of the secular education in all schools covered by the compulsory attendance laws. There is no reason to believe the legislature meant anything else. A State always has a legitimate concern for maintaining minimum standards in all schools it allows to operate. As in *Allen*, we find nothing here that undermines the stated legislative intent; it must therefore be afforded appropriate deference."[39]

ii) *Excessive entanglement*

In addition, the district court, without referring to the matter of "excessive government entanglement" in its opinion, recognized[40] that there was no such entanglement here.

iii) *Primary effect*

The decision of the court below, therefore, rested entirely upon its belief that the Act violated the second test, i.e., that its primary effect was to advance religion. The court erred in making this determination because:

(a) It failed to recognize the constitutional significance of the payment to parents;

(b) It failed to recognize that the primary effect of the legislation is aid to education by means de-

39. 403 U.S. at 613. Although both courts focused upon quality and minimum standards, there is implicit in the Act an additional secular legislative purpose; i.e., the support of parents' constitutionally protected freedom to choose the educators of their children. *See* discussion *infra*.

40. *See* note 34, supra.

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signed to secure the right of the person to the free exercise of religion;

B. The court below erred in its determination of the primary effect of Act 92.

1) *Failure to recognize the constitutional significance of payments to parents.*

a) *Parent, not school, is real beneficiary.*

An important feature of Act 92 is the fact that payment is to be made directly to the parent by way of reimbursement for tuition previously paid by him to a school. There is no payment by the State to the school. This fact is crucial and, indeed, the court below saw the problem in terms of whether or not "there is a constitutional difference between paying tuition to the school and reimbursing the parent for payments the parent has made to the school?"[41]

In its opinion, however, the lower court found that there was no constitutional difference, holding: (a) that the parent was a mere conduit through which the funds passed to the schools and, (b) even if this were not the case, the state has no power to aid *a parent* in providing religious education for his child. The following extract[42] from the opinion of the court below makes this quite clear:

> "However, we do not perceive any consitutional significance in the fact that payments are made in the form of reimbursement to the parents, a conduit plan or directly to the school. The economic consequences are the same for the church-related school whether it receives funds through a direct grant, a conduit plan or because the state increases family income through a reimbursement program which enables the parents to continue to pay tuition. In each case, tax-raised funds are being used to subsidize religious education.

41. Judge Hastie, in Notes of Hearing, dated February 23, 1972, at p. 15.

42. 340 F. Supp. at 1365.

"Finally, even if we held that the Act does not aid sectarian schools, we must still conclude that the act supports religion because it aids parents in providing a religious education for their children. It would seem indisputable that at least one, if not the main, purpose of a parent's sending his child to a religious school is to insure the early inculcation of religion. *See* Walz, *supra*, 397 U.S. at 671, 90 S.Ct. 1409, at 1412. Assuming equal secular educational standards as between public and religious schools, it is an almost inescapable sequitur that the statutory reimbursement is solely to enable the parents to augment the public school secular education with religious training. If parents cannot afford to provide religious education for their children in sectarian schools without state aid, then by providing a program for aiding the parents, the state is plainly advancing religious education. The state has no more power to subsidize parents in providing a religious education for their child than it has to subsidize church-related schools to do so. *See* Brusca v. State of Missouri ex rel. State Bd. of Ed., 332 F. Supp. 275 (E.D. Mo. 1971)."[43]

The court below, by erroneously deeming the parent to be a mere conduit, failed to recognize the distinction between persons and institutions which has often been recognized by this Court. Thus, in *Lemon v. Kurtzman*, this Court distinguished the earlier Pennsylvania purchase-of-service plan, with its method of providing aid "directly to the church-related school", from other cases in which the aid went "to the student and his parents". The Court stated:

"The Pennsylvania statute, moreover, has the further defect of providing state financial aid directly to the church-related school. This factor distinguishes both *Everson* and *Allen*, for in both those

43. *Id.*

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> cases the Court was careful to point out that state aid was provided to the student and his parents—not to the church-related school. [citation]. In *Walz* . . . the Court warned of the dangers of direct payments to religious organizations:
>
> " 'Obviously a direct money subsidy would be a relationship pregnant with involvement and, as with most governmental grant programs, could encompass sustained and detailed administrative relationships for enforcement of statutory or administrative standards . . .' "[44]

This language clearly shows that this Court has deemed the difference between grants to persons and direct payments to religious organizations a significant one. Further, its significance lies in the fact that direct payments create that excessive entanglement, that involvement, those administrative relationships, between government and religious institutions, which, when excessive, are forbidden by the Establishment Clause. The evil in direct grants is excessive entanglement, not the advancement or support of religion.

b) *The activity aided is neutral.*

The court below rejected this "reading of *Everson* and *Allen*"[45], insisting that it was not the fact that persons were the recipients, but rather that the aided activities (bus rides and secular text books) were "non-ideological or secular", which made the difference.

This is a possible approach to *Allen* and *Everson*, but it is certainly not borne out by the very plain language of this Court in *Lemon* and *Walz*, quoted above. In both *Allen* and *Everson*, the Court did speak of the fact that the activity aided was non-ideological and secular, but this is a questionable test, smacking of a religious test for the

44. 403 U.S. at 621.
45. 340 F. Supp. at 1363-64.

enjoyment of welfare benefits, and is inconsistent with the *Everson* language[46], reaffirmed in *Sherbert*, indicating that no one may be denied the benefits of public welfare legislation "because of their faith or lack of it." *See* note 55 *infra*. Furthermore, there are situations where government aid is provided directly to religious activity, *e.g.*, chapels on military installations; but, so long as the facilities are available to all on a non-preferential basis, there is no constitutional violation. The reason, of course, is because the real activity aided is the *free exercise* of religion; religion *as such* is aided only indirectly if, as and when, individual persons (and groups) proceed, by their own free acts, to use the premises for their own particular religious purposes.

Consequently, even if we assume, *arguendo*, that the lower court was correct in stating:

> ". . . that . . . the character of the aided activity rather than the manner in which aid is given . . . [determines] whether the state subsidy has the primary effect of advancing religion",[47]

we are brought back again to the fundamental question in this case—whether we are going to emphasize the Establishment Clause, and see the *school* with its *religion*, or, whether we are going to emphasize the Free Exercise Clause and see the *parent* with his *religious freedom*.

Those who take the first position will see an improper advancement of religion; those who take the second view will see a very proper encouragement of freedom. If the parent—and not the institution—is the true beneficiary,

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46. Apparently this is one of those instances, referred to by Mr. Chief Justice Burger in *Walz*, when he said: "The considerable internal inconsistency in the opinions of the Court derives from what, in retrospect, may have been too sweeping utterances on aspects of these [Religion] clauses that seemed clear in relation to the particular cases but have limited meaning as general principles." 397 U.S. at 669.

47. 340 F. Supp. at 1364.

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then the "character of the aided activity" *is* secular and non-ideological. The aided activity is not religion, but religious liberty. *Religious liberty is neither sectarian nor ideological; it is an activity which may most certainly be aided by the state.* Here, perhaps, is the very core of the problem facing this Court in this case. When the Court has been faced with close questions involving the clash of the two Religion Clauses, it has "struggled to find a neutral course between the two".[48] In all such cases it should be remembered that the policy of "benevolent neutrality" favors freedom; while an excessive emphasis upon non-Establishment produces "hostility".[49]

The ideal sought to be protected by the First Amendment is not the negative concept of non-establishment but rather the positive free exercise of religion. The *end* is freedom, the free exercise of religion; the *means*, which is intended to buttress that freedom, is the ban on establishment. Surely, when the application of the means does not serve the end, it is the end which should prevail.

The lower court, by emphasizing establishment rather than free exercise failed to perceive the basic issue in this case. By analyzing the statute with exclusive reference to "Establishment Clause" principles, and ignoring the far more crucial "Free Exercise" question, the court erroneously determined the test of constitutionality to be, not whether or not religious freedom is secured, but rather, whether or not tax funds are or may be used to subsidize religion. Having drawn the incorrect conclusion, the district court inevitably fell into the trap of that "brooding and pervasive devotion to the secular, and [that] passive or even active, hostility to the religious" against which Justices Harlan and Goldberg warned:

> "Untutored devotion to the concept of neutrality can lead to invocation or approval of results which partake not simply of that non-interference and non-

48. Walz v. Tax Commission, 397 U.S. 664, 668 (1970).
49. Zorach v. Clauson, 343 U.S. 306, 312-314 (1952).

involvement with the religious which the Constitution commands, but of a brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious. Such results are not only not compelled by the Constitution, but, it seems to me, are prohibited by it."[50]

In its failure to see the parent and his religious liberty, due to its preoccupation with the school and its religion, the court below lays itself open to the criticism expressed by Mr. Justice Stewart in the *Sherbert* case, ten years ago—the charge of insensitivity to religious liberty. Mr. Justice Stewart stated:

> "I am convinced that no liberty is more essential to the continued vitality of the free society which our Constitution guarantees than is the religious liberty protected by the Free Exercise Clause explicit in the First Amendment and imbedded in the Fourteenth. And I regret that on occasion, and specifically in Braunfeld v. Brown, 366 US 599, 6 L. Ed. 2nd 563, 81 S. Ct. 1144, supra, the Court has shown what has seemed to me a distressing insensitivity to the appropriate demands of this constitutional guarantee. By contrast I think that the Court's approach to the Establishment Clause has on occasion, and specifically in Engel, Schempp and Murray, been not only insensitive, but positively wooden, and that the Court has accorded to the Establishment Clause a meaning which neither the words, the history, nor the intention of the authors of that specific constitutional provision even remotely suggests."[51]

Contrary to the opinion of the lower court, the fact that the parent (and not the institution) is the recipient of the funds is crucial with respect to both of the Religion Clauses in the First Amendment.

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50. School District of Abington Township v. Schempp, 374 U.S. 203, 306 (1963) (Goldberg and Harlan, J.J., concurring).
51. 374 U.S. at 413-14.

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The Establishment Clause forbids state action which advances or inhibits religion; where the institution (religious) is the recipient of the funds there is a substantial risk that the government officials who administer the funds, by tendering or withholding funds and placing or ignoring restrictions on their use, will improperly influence the particular institution, favoring some and embarrassing others, and thus advancing or inhibiting religion. Although such improper activities are not inevitable, as evidenced by the numerous programs which have flourished over the years without complaint[52] the risk is there, at least in theory, and ought to be avoided if possible, at least as a matter of prudence, if not as a matter of law.

Where the administrators deal directly with the individual person, however, and are barred from any sort of control over the institution, as in the instant case,[53] the risk of interference or favoritism with respect to the institution is eliminated. The decision whether or not any funds shall go to any particular institution, sectarian or nonsectarian, is taken out of the hands of the public officials and placed in the hands of the individual parent-recipients. Thus, the opportunity to advance or favor any particular religion is denied the state officials, and left in the hands of the private person, where, of course, such decisions belong.

In the present matter, the court below failed to recognize this fundamental distinction: The Constitution requires *government* to be neutral; it does not require the individual citizen to be neutral.

By denying the distinction between individuals and institutions, deeming the former mere conduits to the latter, the lower court has imposed the necessity of neutrality

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52. *Cf.* The G.I. Bill under which war veterans were educated in schools of their choice at government expense; and provisions for education of Congressional and Supreme Court pages. In neither case is there any discrimination against religious schools.

53. Section 4 of the statute bars any regulation or control of schools by the Authority administering the Act.

(which properly applies to the state) upon individual persons to whom it cannot possibly apply. The *state* must be neutral but the *individual* is entitled to the free exercise of religion. To demand that he exercise his freedom only in a "neutral" fashion is to posit the absurd. But that is precisely what happens when the person is told that:

(a) he has a constitutionally protected right to choose the teachers of his children;

(b) the state will help him to exercise that right by financing the education of the children;

(c) the parent will be entitled to such assistance, however, only if he chooses a "neutral" school; and

(d) if he chooses a sectarian school, he will be denied the aid which otherwise is available to all parents.

When the state assists a person to exercise a constitutional right, the aided activity, i.e., the exercise of free choice, is not a sectarian matter. The state then is neutral. *How* and in what direction the person proceeds is his own affair and does not constitute state action.

c) *Denial of benefits for religious reasons is unlawful.*

This Court has often declared that the State may not inhibit the exercise of constitutionally protected freedoms by demanding their non-exercise as a condition of its favor or largesse. Thus, in *Sherbert*,[54] this Court rejected the idea that an applicant for unemployment compensation might be denied those benefits otherwise available to unemployed persons available for work because, as a Seventh Day Adventist, whose religious beliefs forbade her to work on Saturday, she had made herself "unavailable" by refusing to accept employment involving Saturday work. In the course of its opinion this Court expressed the following principles which appear to be highly relevant here:

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54. 374 U.S. 398.

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"It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege.[55] (Numerous cases and other authorities cited).

". . . conditions upon public benefits cannot be sustained if they so operate, whatever their purpose, as to inhibit or deter the exercise of First Amendment freedoms . . . The imposition of such a condition upon even a gratuitous benefit inevitably deter[s] or discourage[s] the exercise of First Amendment rights or expressions and thereby threaten to produce 'a result which the State could not command directly.' "[56]

In ordering that the unemployment benefits should be paid to the plaintiff, this Court denied that it was thereby fostering the "establishment" of her religion. The Court stated:

"In holding as we do, plainly we are not fostering the 'establishment' of the Seventh Day Adventist religion in South Carolina, for the extension of unemployment benefits to Sabbatarians in common with Sunday worshippers reflects nothing more than the government obligation of neutrality in the face of religious differences, and does not represent the involvement of religious with secular institutions which it is the object of the Establishment Clause to forestall". (Citing *Schempp*)[57]

and

"This holding but reaffirms a principle that we announced a decade and a half ago, namely that no State may 'exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Nonbelievers, Presbyterians, or the members of any other

55. *Id.*, at 404.
56. *Id.*, at 405.
57. *Id.*, at 409.

> faith, *because of their faith, or lack of it*, from receiving the benefits of public welfare legislation. Everson v. Board of Education, 330 U.S. 1, 16."[58]

Contrary to prior holdings of this Court, the court below is insisting that parents who exercise their constitutionally protected right to direct the religious upbringing of their children by selecting a church-related school, must *therefore* be denied the welfare benefits in the form of tuition subsidies, which are made available in one form or another for all other parents in the Commonwealth.

As in *Sherbert*, so here, the payment to the person presents no "involvement of religion with secular institutions which it is the object of the Establishment Clause to forestall." As in *Sherbert*, so here, individual persons (parents) are inhibited and deterred in the exercise of their First Amendment freedom (the right to choose the school and thereby to direct the religious upbringing of their children) by the action of the court below in forbidding the payment of benefits which would otherwise be available to them. That action by the court plainly threatens to produce a result (the forced transfer of many children from nonpublic schools) which the State could not command directly. The decision of the court below, then, like the lower court decision in *Sherbert*, should be reversed.

d) *The state has power to assist parents in the exercise of their constitutional rights.*

Finally, as if recognizing the weakness of its treatment of the parent as a mere conduit, the court below held[59] that, even if the aid were admittedly directed to parents and not to schools, it would still be an improper support of religion. The district court stated:

> "Finally, the Act supports religion because it aids parents in providing a religious education for their children.

58. *Id.*, at 410 (Emphasis by the Court).
59. 340 F. Supp. at 1365.

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* * *

"The State has no more power to subsidize parents in providing a religious education for their child than it has to subsidize church-related schools to do so. *See* Brusca v. State of Missouri ex rel. State Bd. of Ed., 332 F. Supp. 275 (E.D. Mo. 1971)."[60]

Again the erroneous result is dictated by the court's inability to distinguish, constitutionally, between persons and institutions.

The Act, here, does not support religion, it supports religious *freedom*. Reimbursement for tuition payments assists the parent to carry the growing burden of meeting the high cost of education, a burden which jeopardizes his constitutional right to choose. The legislative findings in Act 92 declare:

"In the exercise of their constitutional right to choose non-public education for their children, parents who support such education make a major contribution to the public welfare. However, the immense impact of inflation, plus sharply rising costs of education, now combine to place in jeopardy the ability of such parents fully to carry this burden."[61]

Furthermore, we have been unable to find any decision of this Court which supports the lower court's finding that the "State has no power" under these circumstances. The only case cited by the court, *Brusca v. State of Missouri*,[62] is not authority for any such proposition. On the contrary, in *Brusca*, the issue was not whether the State had power to act, but only whether it was required to act. The *Brusca* court said:

"The issue presented by the amended complaint is not so much what Missouri *may* do but what it *must* do in aid of religious education.

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60. *Id.*

61. 24 P.S. §5702; 340 F. Supp. at 1366.

62. 332 F. Supp. 275. (E.D. Mo. 1971), *aff'd*, memorandum decision, — U.S. —, 92 S. Ct. 1493 (1972).

* * *

> All that is here involved is whether the enactment of some program designed to assist a parent in educating his child religiously with the use of tax-raised money is *mandated* by the First Amendment. On this narrow issue we hold that to the extent the Religion Clauses of the First Amendment to not prohibit such financial aid, they do not require that it be given by the State."[63]

On the basis of that case, and that case alone, the court below held that the State has no power to subsidize parents in providing a religious education for their children. There are no other cases cited by the court and, as a matter of fact, the issue is now before this Court for argument for the first time. Even if *Brusca* is correct, *i.e.*, there is no constitutional mandate requiring aid,[64] it does not follow that the State *may* not act.

It should be noted that the Constitution forbids laws "*prohibiting* the free exercise" of religion—*not* laws *protecting* that right. Indeed, the protection of the rights of citizens is the very reason for the existence of our government. In the words of the Declaration of Independence:

> "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain inalienable Rights, that amongst these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among men . . ."[65]

This Court has declared that parental rights in education are a part of this fundamental liberty.

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63. *Id.* at 276 and 279. (Emphasis by the Court).

64. This matter need not be considered here because there is no demand for such a mandate. The Pennsylvania legislature has acted and the demand is on the part of the plaintiff-appellees to set aside the law.

65. Declaration of Independence, July 4, 1776. 1 Stat. 1.

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> "The fundamental theory of liberty upon which all governments in this Union repose excludes any general power in the State to standardize its children by forcing them to accept instruction from public teachers only."[66]

It follows, then, that government has the power to secure the rights of parents to choose nonpublic teachers for their children. Indeed, this Court recognized that such legislative action was a proper public purpose in the earlier *Lemon* case,[67] and, here also, the court below has accepted the expressed legislative purpose as valid.[68]

Although there are no decisions in which this Court has found that aid is mandatory, neither has it held that legislatures lack the power to take appropriate action to protect religious freedom. Indeed, Mr. Justice Stewart, concurring in *Sherbert*, has indicated that he believes the Free Exercise Clause "requires government to create an atmosphere of hospitality and accomodation to individual belief or disbelief", and that the "Constitution commands the positive protection by government of religious freedom."

> "I think the process of constitutional decision in the area of the relationships between government and religion demands considerably more than the invocation of broad-brushed rhetoric of the kind I have quoted. And I think that the gurantee of religious liberty embodied in the Free Exercise Clause affirmatively requires government to create an atmosphere of hospitality and accommodation to individual belief or disbelief. In short, I think our Constitution commands the positive protection by government of religious freedom—not only for a minority, however small

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66. Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925). *See also* Wisconsin v. Yoder, — U.S. — 32 L. Ed. 2nd 15 (1972).

67. 403 U.S. at 613 (Act 109 was invalidated for other reasons).

68. 340 F. Supp. at 1360.

—not only for the majority, however large—but for each of us."[69]

Although Justices Harlan and White dissented in the same case, they did insist that States cannot be *compelled* (their emphasis) to make such accommodations and expressed the view that there is "enough flexibility in the Constitution to permit legislative judgment."

> "The constitutional obligation of 'neutrality,' (citing *Schempp*) is not so narrow a channel that the slightest deviation from an absolutely straight course leads to condemnation. There are too many instances in which no such course can be charted, too many areas in which the pervasive activities of the State justify some special provision for religion to prevent it from being submerged by an all-embracing secularism. The State violates its obligation of neutrality when, for example, it mandates a daily religious exercise in its public schools, with all the attendant pressures on the school children that such an exercise entails. (citing Engel and Schempp) But there is, I believe, enough flexibility in the Constitution to permit a legislative judgment accommodating an unemployment compensation law to the exercise of religious beliefs such as appellant's."[70]

It is submitted that there is enough flexibility in the Constitution to support the legislative judgment in the instant case. Pennsylvania, by subsidizing the consumer, has eliminated the "excessive entanglement" which invalidated its previous Act, and has effectively avoided any violation of either neutrality or free exercise. Act 92 should be upheld by this Court. Rigidity in discovering Establishment Clause barriers in every situation, no matter how far the legislators may have gone to meet the problem, can

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69. 374 U.S. at 415-16.
70. *Id.*, at 422-23.

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only result in the gradual extinction of nonpublic schools and, with them, the precious right of parents to choose the teachers of their children.

If the steady increase in the cost of education, and of educational and other taxes,[70a] coupled with a steady refusal by the courts to permit reasonable remedies, continues to force more and more parents to surrender their constitutionally protected right to see to the religious and spiritual upbringing of their children, then certainly the pervasive activities of the State will have submerged religion in an all embracing secularism.

In the opinion of your *amicus*, the plan devised by the Commonwealth of Pennsylvania, in order to foster educational opportunity for all children,[71] is a valid exercise of legislative power, and the reasons which moved the lower court to declare the plan invalid are erroneous. Your *amicus* therefore urges this Court to reverse the decision of the court below.

2) *The primary effect of Act 92 is not aid to religion, but aid to the free exercise thereof.*

a) *The myth of neutrality in education.*

Granted that government is required, under our Constitution, to be neutral with respect to the numerous, and often conflicting, views, opinions and beliefs, which flourish in our pluralistic society, the question is raised: How can government achieve the required neutrality in the area of aid to education?

It would seem that there are three theoretically possible courses open:

70a. Armstrong, "The Right Kind of Tax Reform," Fortune, December 1972, at p. 86; reporting Miller and Herriot, "Study of 1968 Income and Taxes," U.S. Census Bureau, where it appeared that the poorest people (under $2000/an.) pay the highest percentage of their income in property taxes, the principal source of school revenue in almost all states.

71. 24 P.S. §5702, 340 F. Supp. at 1356, 1366.

i) it can adopt a hands-off policy, offering no aid to education (public or private) at all, leaving the entire field to private initiative and private resources;

ii) it can decide to aid education only in such forms as are themselves neutral with respect to religion; or

iii) it can offer aid to all education without discrimination as between the religious flavors which distinguish the various kinds of education, *i.e.*, without preferring any one or more views over the others.

It is the position of your *amicus* that the first two options are impossible and that, consequently, given the admitted and well recognized right and power of government to further the education of its citizens, the only possible way in which this can be done without violating the constitutionally mandated neutrality is the third option—offering aid to all forms of education meeting adequate standards but without either granting or denying aid on the basis of religion.

i) *A hands-off policy is impossible.*

This proposition needs no lengthy explanation or proof. We are committed to the idea of universal education, and so long as we have not eliminated poverty and other major economic inequalities in our society, it is and will remain impossible for government to wash its hands of the responsibility for insuring that every person shall have an equal opportunity for education. The problem, then, is not *whether* government should concern itself with education, but rather, *how* it can express a proper concern without violating the fundamental rights of the person.

ii) *Aid restricted to neutral education is impossible.*

The idea that the financial aid which government may grant to education must be restricted to neutral education is impossible because there is no such thing as "neutral" education.

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That approach which is often referred to as "neutral" is, in fact, the so-called secular humanist or secularist approach, the principal tenet of which is the belief that so-called "religious" concepts, *i.e.*, concepts derived from belief in a personal deity, are irrelevant to the life of man on earth. Consequently, according to this belief, education, which is seen as preparation for life in the world, should eschew such concepts. Only that type of education, therefore, which ignores "religious" views is deemed to be neutral; while all others are deemed to be "sectarian". Of course other such negative views, such as an atheistic, agnostic or non-sectarian view are often accepted as "neutral".

The chief difficulty with this approach of "neutrality" is the fact that the "neutral" view is, itself, religious. The secular humanist is entitled, equally with the theist, to be protected in his free exercise of religion. His views are as important to him as are the views of an atheist or an agnostic, a deist, or any theist. By the same token, he has as little right as any of these to have his views established, *i.e.*, sponsored or favored, by any government which is subject to the Religious Clauses of the United States Constitution. The status of secular humanism as a religion has been recognized by this Court when it declared in *Torcaso v. Watkins*, 367 U.S. 488, 495, n. 11 (1961):

> "Among religions in this country which do not teach what would generally be considered a belief in the existence of God are Buddhism, Taoism, Ethical Culture, Secular Humanism and others."[72]

Now the secular humanist cannot reasonably have it both ways. He cannot insist that he is entitled to protection for the free exercise of his religion while, at the same

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72. *See also*, L. PFEFFER, CREEDS IN COMPETITION (1958). Mr. Pfeffer, counsel in *Torcaso* and the present case, stated: "In this study I shall regard humanism as a religion . . . This, I submit, is not an unreasonable inclusion. Ethical culture is exclusively humanist but is generally considered a religion." at 5.

time, claiming that his opinion may be adopted as a non-religion, a so-called "neutral" position and, therefore, not subject to the strictures of the Establishment Clause.[73] In an earlier and simpler day, this kind of ratiocination was known as having one's cake and eating it too.

The concept of so-called "neutral" education has been discussed by William D. Valente, of counsel to the Defendant-Appellants here and professor of law at Villanova University. Having observed that public education cannot be neutral any more than other schools, and that its religion is secular humanism, Professor Valente went on to point out the resistance which normally meets this concept:

> "Unfortunately many citizens who are committed to secularized education rejected these observations as unwarranted imputations of hostile intent. Nevertheless, we must be concerned with effects and not with good intentions. As stated by Professor Phenix in Columbia's Teachers College Record (October 1955, page 30):
>
> > 'It seems unfortunately to be the case that what has been presented as a means of preserving religious peace and freedom through secularization has to some extent become a method of

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73. *See* Freund, *Public Aid to Parochial Schools*. 82 HARV. L. REV. 1680 (1969) [hereinafter cited as *Freund*]. Professor Freund attempts to support precisely this two-faced "definition" arguing that: "This analysis is indeed useful, and indicates that the apparent discrepancy in definition is not unprincipled; but from the point of view of an idiosyncratic sect the sense of non-neutrality cannot but remain.", at 1686-87, n. 14. His analysis is most certainly useful as a self-serving declaration on behalf of the secularists, but many millions of his fellow Americans, idiosyncratic as they may be, will find the Professor's peculiar definition of neutrality as unacceptable as his totalitarian views concerning the undesirability of political debate and division in the matter of the religious guaranties. This matter of political divisiveness is treated elsewhere in this brief, see p.p. 59-69 *infra*, in connection with the discussion of *Wolman v. Essex*, 342 F. Supp. 399 (S.D. Ohio E.D. 1972); *aff'd* — U.S. —, 34 L. Ed. 2d 69 (1972).

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propagating a particular dogmatic faith, namely, scientific naturalism, or, to give it another name, naturalistic humanism.'

"Furthermore, the argument that non-theistic orientation makes education neutral ignores fundamental educational psychology. For many, such neutrality 'against' is a positive, though subtle indoctrination of the secularist viewpoint. Dr. Luther A. Weigle, formerly of Yale Divinity School, emphasized this point:

> 'The ignoring of religion in the schools inevitably conveys to the children a negative suggestion . . . It is natural for them to conclude that religion is negligible or unimportant, or irrelevant to the main business of life.'

"This is not a theologian's refinement. Sir Walter Moberly, prominent British educator, made the same observation:

> 'It is a fallacy to suppose that by omitting a subject you teach nothing about it. On the contrary you teach that it is to be omitted, and that it is therefore a matter of secondary importance. And you teach this not openly and explicitly, which would invite criticism; you simply take it for granted and thereby insinuate it silently, insidiously, and all but irresistibly.'

"Since one-third of the child's waking hours are spent in school, in a secularist atmosphere, where the urge to conform is considerable, and this pattern endures through so great a part of his growth, parents may legitimately deny the neutrality of the government school."[74]

It is, of course, just such considerations as these which lend weight to parents' concern for the right to choose the educators of their children, a right vindicated

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74. Valente, *Freedom in Education*, TORCH AND TRUMPET (Jan., 1964) [hereinafter cited as *Valente*].

by this Court nearly 50 years ago in *Pierce* and reiterated only last year in *Wisconsin v. Yoder*, — U.S. —, 92 S.Ct. 1526, 32 L.Ed.2d 15, 35 (1972), where this Court quoted the following "most significant statement" from *Pierce:*

> "Under the doctrine of *Meyer v. Nebraska*, 262 U.S. 390, we think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control. As often heretofore pointed out, rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the State. The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the States to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations? [citation of *Pierce*]"

This Court, in *Yoder*, continued:

> "The duty to prepare the child for 'additional obligations', referred to by the Court, must be read to include the inculcation of moral standards, religious beliefs and elements of good citizenship. * * *
>
> However read, the Court's holding in *Pierce* stands as a charter of the rights of parents to direct the religious upbringing of their children."[75]

The Court also recognized that the teachers in public schools may well be hostile to the religious faith of some citizens, so that exposure to such teachers may interpose a serious barrier to the integration of the child into his religious community.[75a]

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75. — U.S. —, 32 L. Ed. 2d 15, 35.

75a. *Id.*, at 22, 23.

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To point out the non-neutral nature of education in the public schools does not mean that those schools must be abolished. As Professor Valente stated:

> "Criticism of the alleged neutrality of the government school should not be taken as an attack on the institution itself. The government school has served well those who prefer man-centered education. It will always play a very large role in America. But, for the sake of truth and justice, we should set to rest the myth that the government school is or can honestly be neutral and serve the educational need of all citizens."[76]

The first two alternatives (a hands-off policy and a policy of aid limited to neutral forms of education) being impossible, we are left with the third alternative: aid to all forms of education without discrimination based on religion.

iii) *Only a policy of non-discriminatory sharing of tax funds without regard to religion is constitutionally sound.*

Only a doctrinaire theory of "absolute separation of church and state" would compel the conclusion that public schools, if they are not neutral, must be abolished. The only sound approach in keeping with the spirit of "benevolent neutrality" adopted by this Court (rather than the doctrinaire theory espoused by the plaintiff-appellees in this case) is that the public schools should be preserved so long as they meet the educational needs of many of our people. However, the monopoly of public funds heretofore enjoyed by public schools should be discontinued in favor of the third alternative, i.e., the sharing of educational tax funds by all legitimate[77] forms of education without

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76. *Valente, supra* note 74.

77. Legitimate forms are all schools which meet the minimum standards required by law. *See Allen* and *Pierce, passim.*

discrimination among the "religious" varieties which distinguish the different kinds of education.

Act 92, here under consideration, does precisely this, it makes available a portion of tax funds to enable parents to exercise their right to choose the teachers of their children. In this way, the Act is consistent with the truly neutral, non-discriminatory policy followed by the federal government in the various "G.I. Bills" under which hundreds of thousands of returning war veterans attended schools of their personal choice, at government expense, without discrimination with respect to the "religious" or "non-religious", "sectarian" or "non-sectarian", "public" or "nonpublic" nature of the school or schools attended. Those programs, as well as others used to educate congressional and Supreme Court pages at schools of their choice, are benevolently neutral, favoring the freedom of educational choice of every beneficiary while denying that freedom to none. The only objection that could be raised to such programs is that they fail to satisfy the extreme demands for "absolute separation" espoused by opponents of Act 92. This Court has long since rejected this extremist view, pointing out in *Walz:*

> "The Establishment and Free Exercise Clauses of the First Amendment are not the most precisely drawn portions of the Constitution. The sweep of the absolute prohibitions in the Religion Clauses may have been calculated; but the purpose was to state an objective, not to write a statute. In attempting to articulate the scope of the two Religion Clauses, the Court's opinions reflect the limitations inherent in formulating general principles on a case-by-case basis. The considerable internal inconsistency in the opinions of the Court derives from what, in retrospect, may have been two sweeping utterances on aspects of these clauses that seemed clear in relation to the particular cases but have limited meaning as general principles.
>
> "The Court has struggled to find a neutral course between the two Religion Clauses, both of which are

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cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other. For example, in Zorach v. Clauson, 343 US 306, 96 L Ed 954, 72 S Ct 679 (1952), Mr. Justice Douglas, writing for the Court, noted:

> 'The First Amendment, however, does not say that in every and all respects there shall be a separation of Church and State.' Id., at 312, 96 L Ed at 961.
>
> 'We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma.' Id., at 313, 96 L Ed at 962.

"Mr. Justice Harlan expressed something of this in his dissent in *Sherbert v. Verner*. 374 US 398, 10 L Ed 2d 965, 83 S Ct 1790 (1963), saying that the constitutional neutrality imposed on us 'is not so narrow a channel that the slightest deviation from an absolutely straight course leads to condemnation.' Id., at 422, 10 L Ed 2d at 981."[78]

The "struggle" of the Court to find a neutral course has been made more difficult by the confusion attendant upon the efforts of proponents of an extreme "separation" theory to impose a requirement of neutrality not only upon government, where it is appropriate, but upon every activity which government touches, including education. But this is impossible. Rabbi Dudley Weinberg, discussing various church-state problems including proposals for a common core program for a course in religion in public schools, commented:

> "When we assume that such a religiously or denominationally neutral core curriculum can be developed, I believe that we overlook a subtle but important truth. We overlook the fact that a curricu-

78. 397 U.S. at 668-69.

lum is not simply made up of books. *In the last analysis, the teacher is the curriculum. A teacher can never be a detached neutral.* He can never withdraw from involvement both with the ideas and the material he presents and with the student who sits opposite him and who is, like himself, a living, outreaching, curious, reacting, hostile or accepting person. I believe that we commit a serious error if we assume that it is ever possible to subtract from the learning-teaching situation the reality that makes the teacher—with all of his own commitments, judgments, affirmations and negations—at least as much a part of the curriculum as is the textbook."[79]

It is submitted that the fact that a "teacher can never be a detached neutral" lies at the heart of the sacred right of parents to select the teachers of their children. This right, however, can become a meaningless phrase if the pervasive power of government, in its steady advance into ever-widening spheres in the life of the citizen, fails to take reasonable steps to preserve religious freedom.

Act 92 is just such a reasonable step. It encourages educational opportunity and educational freedom for all, while avoiding the entanglement of government and religion forbidden by the Establishment Clause and the encroachment upon parental freedom forbidden by the Free Exercise Clause, and it does this without advancing or inhibiting any religion. Act 92 should be sustained by this Court.

b) The primary effect of the Act is aid to freedom of choice.

The court below found that the primary effect of the legislation is aid to religion. This is not true. The primary

79. *See* Comments of Rabbi Weinberg at Second National Institute Planning Meeting, New York City, May 19, 1962. Published by National Conference of Christians and Jews, Project, Religious Freedom and Public Affairs, in pamphlet entitled *Religion and Education*, p. 43. (Emphasis supplied).

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effect is aid to persons in their efforts to secure education for their children. The aid, then, goes to persons, not to institutions; and that which is primarily aided is their personal freedom to choose the school for their child.[80]

Parents have the constitutionally protected right *(Pierce)* to choose education for their children other than the kind which is offered by state-hired teachers; they also have the right to choose the latter kind. That is, they have the right to choose public education or nonpublic education; they have the right freely to choose to entrust their children to public school teachers or to nonpublic school teachers.

Those parents who wish to choose public school teachers can send their children to public schools, where the entire tuition is subsidized with public funds. This is not new. What Act 92 does is to help to even the scales of justice by offering to those other parents, those who wish to choose nonpublic school teachers, a subsidy also. In this way, parents are enabled to make the choice—a constitutionally protected choice—between the two kinds of schools, the two kinds of teachers, the public and the nonpublic.

There is nothing wrong with this action of the state. It does not violate, but rather fulfills, the mandate of the Declaration to "secure these rights."

Plaintiffs, in their efforts to invalidate Act 92, were moved by motives not of liberty, but rather of religion. They seek to inject the question of religion into the picture by arguing that the reason, the motive, why many parents choose to send their children to nonpublic schools, is religion. Therefore, they say, the primary purpose of the *Act* is aid to religion. They are here confusing the purpose and

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80. The legislation indirectly aids religion in that the method selected for aid to education (tuition reimbursement) is designed to secure the parental freedom of choice, a freedom whose exercise is very often motivated by religious considerations. This indirect aid to religion, however, *is* indirect. It is not the *primary* effect. It is rather inevitably, the indirect effect which flows from the exercise of religious freedom.

motives of some (even most, perhaps) parents with the purpose and motive of the state. This is a fundamental error.

The motive of the state and the motives of parents are not the same thing. Under our Constitution, the State must be neutral with respect to religion; it must avoid making judgments or taking actions which favor one or another of the many conflicting and competing ideas concerning religion. But, parents are under no such restriction. Parents are not required to be neutral. Parents have the right and the high responsibility *(Pierce)* to make the judgments and to take the actions, which are forbidden to the State.

The State may, indeed must, encourage freedom. It may not, indeed it must not, seek to exercise that freedom for the person. The encouragement of freedom, for all, is a proper, an essential function of the State. The exercise of that freedom is reserved to the person.

i) The purpose of the state under Act 92.

The State in Act 92 seeks to encourage education generally, and to encourage freedom of choice in education by providing the parent with the means to exercise that freedom without the coercive effect of economic necessity. The State recognizes that the right to choose a particular kind of education should not be restricted to those with fat purses. As Mr. Justice Douglas said, in delivering the opinion of the Court in *Murdock v. Pennsylvania*, 319 U.S. 105, 111 (1942), "Freedom of speech, freedom of the press, freedom of religion are available to all, not merely to those who can pay their own way." Poor parents also have the right to choose the teachers of their children, a right which is of little practical value so long as the state, in the exercise of its power to tax and spend for education, taxes everyone but spends only for the benefit of those who choose to send their children to public school teachers. This is not freedom of choice. Act 92 is a recognition of this fact by the Commonwealth of Pennsylvania and a move in the direction of freedom.

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The Commonwealth advances freedom in a manner which, while safeguarding the freedom of all, avoids doing anything which might compromise that state neutrality, with respect to religion, which is but another aspect of freedom. Thus Act 92, by directing the funds to the parents, and not to the nonpublic institutions, subsidizes freedom which is to be exercised by the parents, and avoids making any judgment or taking any action with respect to religion which, in many cases, is an essential element in the institution. In this way, the Commonwealth has avoided that "excessive entanglement" which is forbidden by the Constitution, and which was the fatal error which this Court found in an earlier attempt by Pennsylvania to solve the problem of educational freedom. (See Act No. 109 of 1968) *Lemon v. Kurtzmann*, 403 U.S. 602 (1971). In the earlier Act, the state chose a method of action which subsidized the supply, rather than the demand; it directed its funds to the institution rather than to the parent; and it thereby became entangled in those excessive state controls over institutions which lead inevitably to the regulation, by the state, of religion. Consequently, the state violated, rather than preserved, liberty.

This question of method is all important.

The state's purpose in both Act 109 and Act 92 is the same, to encourage freedom of choice in education; but the methods selected are profoundly different. In Act No. 109, the method selected was aid to institutions with concomitant controls over the curriculum, particularly the religious aspects of that curriculum. The *effect* of their method was to destroy, rather than to encourage, freedom, and to violate that neutrality which is the only proper attitude of the state with respect to religion. It was a fatal error.

As this Court stated in *NAACP v. Alabama*, 377 U.S. 288, 307 (1964):

> "'. . . governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep un-

necessarily broadly and thereby invade the area of protected freedoms.'"

Act 92, with its aid to parents rather than to institutions, and its scrupulous avoidance of any element of state control over those institutions, has thereby achieved the purpose of encouraging freedom of choice in education, while using a method which avoids the fatal error.

ii) The purpose of the parent.

As we have indicated, *supra*, the purpose of the state and the purpose of the parent must not be confused. It is the state, and not the parent, which is required, to be neutral. It is the state, and not the parent, which must close its eyes to religious judgments. The state must be scrupulous in maintaining its neutrality in matters of religion, it must not, however, seek to impose a similar neutrality upon persons, particularly parents.

Each parent has the right, in exercising his constitutionally protected freedom to choose the educators of his children, to make that choice in accordance with whatever criteria of value may seem appropriate to him. It is not the business of the state to judge these criteria. So long as the schools selected fulfill the minimum standards which are within the proper jurisdiction of the state to impose, the reasons which may or may not impel various parents to choose one school rather than another, are not the concern of the state. One parent might prefer school A for its discipline; another might choose school B because it emphasizes a liberal or even permissive approach. One might prefer a school's emphasis upon the classics; another might find a modern school more to his taste. And there is no doubt, that for many parents (the great majority, perhaps?), a very important criterion, possibly the most important of them all, is the attitude of the particular school with respect to the great questions which underlie all education: What is man? Whence does he come? Whither is he going? Why

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does he live? How should he live? What, if anything, is the purpose of existence? These are some of the great questions to which religion and philosophy seek to supply answers. For many parents, those answers, whether they be theistic or atheistic, or somewhere in between, are vitally important reasons for selecting or rejecting particular schools.

In any event, whatever be the approach of the school, or whatever criterion seems most compelling to the choosing parent, *the matter is not one with which the state may concern itself.*[81] In this field of value judgments, and preeminently in the field of religious values, no arm of the state may presume to decide which choice is valid, which invalid; which is better, which worse; which is true, which false.

Statesmen, those men and women to whom the powers of government have been entrusted, are human beings like the rest of us, and, being human, they have their own personal beliefs and convictions with respect to all of these value judgments. But in their role as statesmen, whether they are magistrates or solons or members of the judiciary, they are bound, by the law and by their oaths to uphold that law, to refrain from making their personal views the basis for their official actions. No matter how firmly they may believe, how deeply they may be convinced, that the choice of one (or many) parents is good or prudent, or that the choice of one (or many) is evil or unwise, they are bound to

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81. Cases such as *Almond v. Day*, 197 Va. 419, 89 S.E. 2d 851 (1955) and *Hartness v. Patterson*, 197 S.E. 2d 907 (S.Car. 1971), where the courts struck down attempts to maintain racial segregation through the subterfuge of directing tuition payments through the parents, are not apposite. There, the parents were participating in a conspiracy to work an injustice against their neighbors by perpetuating racial segregation. Here, the state assists the parent in the exercise of his constitutional right. There is no constitutional right to inflict racial segregation on your neighbor. In fact, Act 92 makes parents ineligible for aid if they select a school which discriminates on racial grounds. For the same reason, the cases cited by the court in *Wolman v. Essex*, 342 F. Supp. 399, 415-16 (S.D. Ohio E.D. 1972) are also inapplicable.

avoid any action by which they would be using their official positions and power to impose their personal views upon their fellow citizens.

The lower court, in permitting plaintiff to inject the issue of religion into this educational matter, has improperly adopted one particular view regarding the role of religion in education and by its decision has imposed that view upon the legislature and the people of Pennsylvania.

This decision ignores the fact that the Constitution makes no provision regulating the role of religion in education. It governs only the role of the state with respect to religion, not the role of religion with respect to other aspects of life. Thus, the judgment, whether or not the secular and the sectarian aspects of education can or should be separated, is not a proper question for this Court. For such a question is a theological one, and this Court, like all other arms of government, is disabled by our Constitution from answering such questions.

C. The court's decision creates an insoluble paradox.

One difficulty created by the excessive emphasis on nonestablishment and by the resulting tendency to impose the neutrality proper to government on nongovernmental persons or agencies, is the "insoluble parodox" noticed by Mr. Justice White in *Lemon*.

> "The Court thus creates an insoluble paradox for the State and the parochial schools. The State cannot finance secular instruction if it permits religion to be taught in the same classroom; but if it exacts a promise that religion not be so taught—a promise the school and its teachers are quite willing and on this record able to give—and enforces it, it is then entangled in the 'no entanglement' aspect of the Court's Establishment Clause jurisprudence."[82]

82. 403 U.S. at 668 (White, J., concurring in part and dissenting in part).

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The district court, in the instant case, ran afoul of this same paradox:

> "Second we conclude that the effect of the Act is to aid the schools and therefore the failure of the state to ensure that the funds are restricted to secular education or general welfare services renders the Act unconstitutional.[8] " [83]

The court's footnote 8 explains the problem:

> "If the Act did include restriction on the use of the funds, the Act would also have to avoid excessive government entanglement with religion in the administration of these restrictions. See *Lemon* and *Tilton*. The combination of the primary effect and entanglement tests clearly restricts the scope of permissible government aid to religious schools."

It is submitted that so long as the two tests are interpreted and applied according to a rigid view of establishment, the scope of government aid will be reduced to practically none at all. This "no aid" approach is perfectly consistent with the views of the proponents of an absolutist concept of separation of church and state; but it leaves much to be desired by those who believe in the importance of freedom and the wisdom of "benevolent neutrality."

Mr. Justice Stewart has referred, in *Sherbert*, to "the Court's duty to face up to the dilemma posed by the conflict between" the two clauses "as interpreted by the Court." [84] So long as the Court fails to face this dilemma,

> ". . . so long will the possibility of consistent and perceptive decision in this most difficult and delicate area of constitutional law be impeded and impaired. And so long, I fear, will the guarantee of true religious freedom in our pluralistic society be uncertain and insecure." [85]

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83. 340 F. Supp. at 1364.
84. 374 U.S. at 416 (Stewart, J., concurring).
85. *Id.*, at 417.

Similarly, Circuit Judge Oakes has expressed the concern that the twin "tests" of excessive entanglement and impermissive involvement "may signify the ultimate demise of the parochial school in America." [86]

All of these seeming dilemmas and apparent paradoxes can be resolved, and the apparent antagonism between the two Religion Clauses reconciled, so that they will work in harmony as was intended, if all concerned will withdraw from a rigid, absolutist, emphasis upon nonestablishment, and recognize the common ideal to be the encouragement of religious freedom of educational choice. Then, government will take whatever steps seem reasonably required to support freedom without preference or favor as between the various kinds of belief and disbelief and without unnecessary and unwelcome attempts by government to regulate or control the religious content or non-content of the education freely selected by the persons.

The plan provided by Pennsylvania's Act 92 seems to fit this formula: it recognizes that some aid is reasonably necessary if hard pressed parents are to be able to exercise their freedom in education; it provides that aid in amounts less than the total cost of the education, thus leaving room for that voluntary effort which is so important to freedom; it forbids any intervention by the state to regulate the schools, deeming the religious content to be a matter which properly belongs between the parent and the school; it makes the aid available to all parents who have chosen or may, in the future, choose any accredited nonpublic school, without discrimination between sectarian and nonsectarian choices, or among the various religious or anti-religious views which may enjoy the favor of the persons. Thus, Act 92 satisfies the demands of both the Establishment Clause and the Free Exercise Clause and preserves the government's neutrality while respecting the freedom of the person.

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86. Americans United for Separation of Church and State v. Oakey, 339 F. Supp. 545, 553 (D. Vt. 1972) (Oakes, Cir. J., concurring). *See* discussion p. 67, *infra*.

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D. Political entanglement—a dangerous departure.

Although the district court, which based its decision upon the primary effect test, found no excessive entanglement between government and religious institutions, nevertheless, for the reasons set forth below, your *amicus* believes it important to discuss the matter of entanglement in this brief.

The profound concern, felt by lawmakers and other citizens, for the survival of pluralism in education, and of the freedom of educational choice inherent therein, has been transformed into a state of alarm as a result of the recent decision of this Court affirming, without oral argument or the filing of briefs, and without opinion, the decision by a three-judge federal court in *Wolman v. Essex*.[87] Although there are a number of distinctions between the statute in *Essex* and our Act 92, the lower court's views in that case[88] reflect a disturbing retreat from the policy of "benevolent neutrality" established by prior well reasoned opinions of this Court,[89] and a definite acceptance of the exaggerated theory of "separation-of-church-and-state," in the absolute sense, which has never been adopted, but often specifically repudiated by this Court.[90] The essence of the *Essex* opinion, and of the opinion of the lower court in the instant case, is a strong tendency to emphasize the Establishment Clause at the expense of the Free Exercise Clause, thus substituting hostility for the required neutrality. If this hostile interpretation of the First Amendment is allowed to stand, the effect upon religious liberty and upon the concept of pluralism in American education will be disastrous.

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87. 342 F. Supp. 399 (S.D. Ohio E.D.), *aff'd.* — U.S. —, 34 L. Ed. 2nd 69 (1972).

88. *Id.*

89. *See* Walz v. Tax Commission, 397 U.S. 664, 669 (1970), and cases cited; Everson v. Board of Education, 330 U.S. 1, 18 (1947).

90. *See* Walz, *supra*, 397 U.S. 644, Zorach v. Clauson, 343 U.S. 306 (1952).

Despite the well recognized importance of pluralism and diversity to our free society, and, although this Court has never formally adopted the hard line of hostility in church-state relations, its action in affirming the decision of the lower court in *Essex* has confounded local and state lawmakers and given rise to deep concern respecting the line between prohibited and permitted forms of public aid for the education of children in schools of the parents' choice.

The cause of this concern is to be found in the *Essex* court's heavy reliance upon a certain passage which appears as Section "IV" in the principal opinion in *Lemon v. Kurtzman*.[91] In that section of the opinion, which counsel for appellant and your *amicus* deem to be *obiter dicta*, the Court speaks of "a broader base of entanglement of yet a different character [which] is presented by the divisive political potential of these state programs".[92]

Chief Justice Burger stated that he deplored the probable intensification of political divisiveness along religious lines resulting from the annual appropriations required under the statute, benefiting relatively few religious groups. The opinion, however, does not expressly declare that this "divisive political potential" constitutes, as a matter of law, a new and separate test[93] of whether or not a legislative plan meets the requirements of the Establishment Clause. It certainly was unnecessary to the decision in *Lemon*, since the excessive entanglement created by the system of state controls with respect to the teaching of "secular subjects" was sufficient to vitiate the statutes. However, the heavy reliance on this concept by the district court in *Essex*, referred to there as "political entanglement", would appear to elevate this theory to the status of a rule of law. Thus, the

91. 403 U.S. at 622-24.

92. *Id.*, at 622.

93. *Id.* This political entanglement test would be in addition to the administrative entanglement which results when government assumes to regulate and control the affairs of religious institutions in an excessive manner.

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Essex court found this doctrine to be "a distinct aspect" (as distinguished from "administrative entanglement") of the excessive entanglement test.

> "In addition, a second and distinct view of the entanglement doctrine involves 'political entanglement' and requires an inquiry into the level and nature of political activity such aid may engender and an analysis of the possible consequences of such political activity fractionalizing the electorate along religious lines." [94]

A brief word might be said concerning the fact that a limited class of persons is benefitted by the program. Although the *Essex* court recognized that the small size of the statutory class was not a basis for a finding of unconstitutionality *per se*,[95] it placed considerable emphasis upon the aspect, suggesting that small classes called for stricter scrutiny in the search for excessive entanglement.[96] There is some support for this concept in *Lemon*, where *Walz* was distinguished on this basis.[97] The short answer to this problem is that "small" and "large" are relative terms. Although only 12% of Ohio's children were eligible for tuition benefits, this was not a small group, but, in fact, the largest possible group, since it encompassed *all* of those who could possibly be assisted (the remaining 88% being subsidized completely in the public schools). Similarly, in Pennsylvania the statute covers *all* persons who choose, or may in the future choose, nonpublic schools. Although in each case the great majority of eligibles (about 90%) have, in fact, chosen one kind of school (Roman Catholic), this is their constitutional right. Surely, the constitutional test cannot be founded upon how large or small a group may be, which opts for one religion, where the right to opt is made available to all. The size of the group is immaterial to the

94. 342 F. Supp. at 413.
95. *Id.*
96. *Id.*
97. 403 U.S. at 623.

constitutional question. Whether, as in Philadelphia and other urban centers, the number of beneficiaries is large (Philadelphia, over 35%) or, as in many rural areas, there may be few if any beneficiaries, the principle is the same. As Mr. Justice Stewart said:

> "And I think that the guarantee of religious liberty embodied in the Free Exercise Clause affirmatively requires government to create an atmosphere of hospitality and accommodation to individual belief or disbelief. In short, I think our Constitution commands the positive protection by government of religious freedom—not only for a minority, however small—not only for the majority, however large—but for each of us." [98]

Due to the action of the *Essex* court, and its affirmance by this Court (although without a hearing or an opinion), and in view of the resulting serious implications with respect to the future of educational freedom in America, we believe it necessary to point out what appear to be the dire consequences of such a policy.

1) Divisiveness and pluralism distinguished.

It is extremely important, in any discussion of these matters, to distinguish between divisiveness and pluralism. Divisiveness is that state of hostility and conflict which arises, in the presence of differing beliefs, as a result of the unwillingness of some men to tolerate the coexistence, on the basis of equal rights, of other beliefs. Pluralism, on the other hand, is the condition which results when men of differing beliefs agree to live together in peace, on the basis of mutual respect and equal rights. Divisiveness seeks to have one view dominate while repressing those who differ; pluralism seeks to permit many views to exist, side by side, with none established as official, and all free to compete for

98. 374 U.S. at 415-16, (Stewart, J., concurring).

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the minds of men. Divisiveness is incompatible with the American constitutional principle; pluralism is an essential corollary of that principle.

2) *The channels of debate must be kept open.*

It is fundamental that pluralism cannot survive in the absence of freedom of expression. The channels of debate must be kept open or else freedom dies. Freedom of speech, of the press, of the right of peaceable assembly, of the right to petition the legislature for a redress of grievances—these, with freedom of religion, make up that galaxy of bedrock rights which have been enshrined in the First Amendment. These are the quintessence of the American Way.

How startlingly and alarmingly inconsistent it is to read in an opinion of our highest Court, and on the authority of one of our foremost professors of law, that, although political debate and division are "normal and healthy manifestations of our democratic system,"[99] religious freedom is an exception!!

The professor, in his article[100] cited by the Court,[101] poses a most extraordinary and shocking solution to a vexing problem in "this most difficult and delicate area of constitutional law" [102]—he proposes to eliminate the debate!

> "Ordinarily, I am disposed, in gray-area[103] cases of constitutional law, to let the political process function . . . The religious guarantees, however, are of a different order. While political debate and division is normally a wholesome process for reaching viable accommodations, political division on religious lines

99. 403 U.S. at 622.

100. *See Freund, supra* note 73, at 1691-92.

101. 403 U.S. at 622.

102. *See* 374 U.S. at 417 (Stewart, J., concurring).

103. *See* Mr. Chief Justice Burger's remark that "the language of the Religion Clauses . . . is at best opaque . . .", 403 U.S. at 612.

is one of the principal evils that the first amendment sought to forestall . . . as between open-ended, ongoing political warfare, and such binding quality as judicial decisions possess, I would choose the latter in the field of God and Caesar and the public treasury." [104]

In this ringing peroration, the professor proposes not only to deny the proponents of public aid for parents' rights in education any access to the normally wholesome forum of political debate—he would seek to use the power of the courts of justice to achieve his purpose; and all of this upon no more authority, in law or in history, than his own *ipse dixit* to the effect that the First Amendment was intended for this very purpose!

Let those who would achieve unity at the price of freedom, attend to these words of this Court:

> "Struggles to coerce uniformity of sentiment in support of some end thought essential to their time and country have been waged by many good as well as by evil men. Nationalism is a relatively recent phenomenon but at other times and places the ends have been racial or territorial security, support of a dynasty or regime, and particular plans for saving souls. As first and moderate methods to attain unity have failed, those bent on its accomplishment must resort to an ever increasing severity.
> *As governmental pressure toward unity becomes greater, so strife becomes more bitter as to whose unity it shall be.* Probably *no deeper division of our people could proceed from any provocation than from finding it necessary to choose what doctrine and whose program public educational officials shall compel youth to unite in embracing.* Ultimate futility of such attempts to compel coherence is the lesson of every such effort from the Roman drive to stamp out Christianity

104. *Freund, supra* note 73 at 1692.

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as a disturber of its pagan unity, the Inquisition, as a means to religious and dynastic unity, the Siberian exiles as a means to Russian unity, down to the fast failing efforts of our present totalitarian enemies. *Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard.*

It seems trite but necessary to say that the First Amendment to our Constitution was designed to avoid these ends by avoiding these beginnings. There is no mysticism in the American concept of the State or of the nature or origin of its authority. *We set up government by consent of the governed, and the Bill of Rights denies those in power any legal opportunity to coerce that consent. Authority here is to be controlled by public opinion, not public opinion by authority.*" [105]

The tragedy of the doctrine of judicial suppression of fundamental rights is that it is inherently evil as contrary to the very essence of democracy and of human freedom; but the tragedy is compounded by the futility of efforts to seek peace through coercion.

The assumption, that a free people, or a substantial portion of them, when faced with the suppression of deeply felt rights by judicial fiat or by any other exercise of governmental power, will meekly subside into quiet acquiescence, misreads the temper of parents in a democratic society intent upon the defense, at whatever cost, of their sacred right to select the teachers to whom they will entrust an important part of the education of their children. Denied effective recourse to the courts of justice, parents will transfer their efforts to other forums, and the battle will continue to rage, its bitter effects worsened, however, by the absence of the ameliorating effects of courts of law. Confronted with the twin thrusts of spiraling costs and the denial of a fair

105. West Virginia State Bd. of Education v. Barnette, 319 U.S. 624, 640-41 (1942) (emphasis added).

share of tax funds, and forced thereby to abandon separate schools,[106] parents will transfer their struggle to the new arena, the monolithic public school, into which they will have been thus compelled to enroll their children. The school itself will become the new battleground, as each warring group, intent upon defending its own children from the imposition of alien theological, philosophical or other profound concepts of moral and spiritual value, seeks to persuade or coerce the school authorities to adopt educational policies and to select teachers whose fundamental values are consistent with each group's own deeply held values. The struggle for dominance, within the public schools, of one or another set of values, will continue to rage, with immense damage to the children and to the entire society, until one view shall have succeeded in suppressing all the others and in establishing itself as the one official set of values which shall be imposed upon all. This is neither freedom nor justice. It is rather the negation of those principles which motivated the founders of our country and moved them to adopt our Constitution, and especially, our Bill of Rights. The victor in such a struggle will become the established religion and the free exercise of religion will have ceased to be a significant element in the lives of our people.

The attempt to suppress differences by governmental *fiat* (whether by judicial or legislative action, or by the administrative action of the authorities who regulate the common schools), is guaranteed, among a people who still maintain the appetite for freedom, to produce the bitter

---

106. President Richard M. Nixon, on March 3, 1970, declared:

"Up to now, we have failed to consider the consequences of declining enrollments in private elementary and secondary schools, most of them church supported, which educate 11% of all pupils-close to six million school children. *In the past two years, close to a thousand nonpublic elementary and secondary schools closed and most of their displaced students enrolled in local public schools.*" (emphasis supplied).

See note 12 *supra*.

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conflict and hostility which the Founding Fathers strove to prevent.

3) *New "test" imperils nonpublic schools.*

The danger inherent in the new "test" was recognized by Circuit Judge Oakes, in *Americans United for the Separation of Church and State v. Oakey*, who saw, in the combination of "excessive entanglement" and what he called "impermissible involvement", the possibility of the "ultimate demise of the parochial school in America." Judge Oakes stated:

> "To me, this would be a most unfortunate result. Ours has been a pluralistic society, fostering creativity out of multiple peoples, religious and philosophical systems of thought, and ethnic ties. Cf. R. Niebuhr, a note on Pluralism, in Religion in America 42 (1950). In the advancement of this pluralistic society the parochial school system has played a not insignificant part. *Lemon*, I fear, will tend toward a homogenization of American education. There will, therefore, be all the more reason to search for ways within the American system of public education that will preserve, indeed promote, the diversity of individual belief—religious, political and social—that, along with our Bill of Rights, distinguishes us so plainly from certain uniform, unified and uni-governed societies elsewhere in the world."[107]

4. *The intention of the Court?*

Your *amicus* is convinced that this Court never intended the inevitable result which would occur if the concept of political divisiveness or political entanglement were to become the law. We are confident that this unfortunate expression of judicial policy was, in fact, one of those "too

107. 339 F. Supp. 545, 553 (D.Vt. 1972).

sweeping utterances" which were referred to by Mr. Chief Justice Burger in *Walz:*

> "In attempting to articulare the scope of the two Religion Clauses, the Court's opinions reflect the limitations inherent in formulating general principles on a case-by-case basis. The considerable internal inconsistency in the opinions of the Court derives from what, in retrospect, may have been too sweeping utterances on aspects of these clauses that seemed clear in relation to the particular cases but have limited meaning as general principles.
>
> "The Court has struggled to find a neutral course between the two Religion Clauses, both of which are cast in absolute terms, and either of which if expanded to a logical extreme, would tend to clash with the other."[108]

It is submitted that *Lemon* need not produce such evil results, for this Court has a new opportunity in this, the second *Lemon* case, to withdraw from the edge of the precipice, to prevent the development of a "downhill thrust"[109] in the direction of an "homogenization of American education."

We believe that the American system of public education is big enough and strong enough to preserve, indeed promote, the education of all children, in both public and nonpublic schools. As was said by several of the Justices in *Yoder:*

> "In this present case, the State is not concerned with the maintenance of an educational system *as an end in itself,* it is rather attempting to nurture and develop the human potential of its children, whether Amish or non-Amish: to expand their knowledge,

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108. 397 U.S. at 668.

109. *Cf.* 403 U.S. at 624, where the thrust seemed to be moving in another direction.

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broaden their sensibilities, kindle their imagination, foster a spirit of free inquiry, and increase their human understanding and tolerance." [110]

So too, the Commonwealth of Pennsylvania, in Act 92, is not concerned with schools *per se;* it is rather attempting to nurture the educational opportunities of all of its children regardless of the schools they may attend. The schools are but means; the end is education. The preservation of a variety of schools is but a means; the end is the preservation of freedom. Where there is no choice, there is no freedom.

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110. — U.S. —, 32 L. Ed. 2d 15, 38 (1972) (White, J., concurring, Brennan and Stewart, J.J., joining) (Emphasis added).

SUMMARY

Pennsylvania's Parent Reimbursement Statute (Act No. 92 of 1971) is a statute carefully designed to secure the right of parents to choose the teachers of their children, in a fashion which avoids excessive entanglement between church and state; all in accord with the language of the United States Supreme Court as expressed in various decisions in which this Court has endeavored to balance the two constitutional principles of free exercise of religion and no establishment of religion; most recently in *Lemon v. Kurtzman, supra.*

In spite of all of this, in spite of the clear language of this Court, and despite the immense economic importance to the education of all of the children in Philadelphia and other great cities and other heavily populated areas, where heavy transfers, forced or otherwise, of students from nonpublic to public schools will create massive disruptions and insurmountable financial problems for already overburdened taxpayers struggling to solve the present problems of public education and the mounting problems posed by rising crime and deteriorating housing and other urban problems—despite all of this, the lower court has ignored the plain intention of the legislature and the equally plain language of this Court and, by the simple process of exaggerating the concept of church-state separation, at the expense of religious freedom, has struck down this very carefully drawn legislation.

The Commonwealth of Pennsylvania is aware of the growing burden of inflation and rising taxes, which burden has endangered the constitutionally protected right of parents to choose the kind of education they wish for their children by making it ever more difficult for such parents to meet the costs of such education. As a result many of the nonpublic schools, which provide the alternate choices without which freedom to choose would be meaningless, are closing, thereby compounding the evil. As a further result, many children formerly educated in nonpublic schools

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are pouring into the hard pressed public schools, adding to the difficulties there, and reducing educational opportunities for all of the children of the Commonwealth.

In order to assist parents to carry their burden, and thereby improve educational opportunities for all, Pennsylvania adopted a statute providing tuition reimbursements for parents whose children attended nonpublic schools. These payments, which are substantially less than the actual cost of education in such schools, are paid directly to the parent; no money is paid to the school; and the State Authority is not permitted to regulate or control the schools. In this way the parent's free exercise of religion is protected while the state avoids setting up such excessive governmental entanglements with the religious schools as would offend the constitutional ban on Establishment of Religion.

The district court however, by overemphasizing the Establishment Clause and undervaluing the Free Exercise Clause, has seen only the school and its religion while overlooking the parent and his religious freedom. The court, contrary to previous decisions of this Court, has ignored the significant difference between aid to persons and aid to schools, and therefore ignored the parent's status as the real party in interest, calling him a mere conduit to carry money from the state to the religious school. Further the court has held, without authority of law, that even if the parent is the real party in interest, the state has no power to help him to secure a religious education for his children.

The court has been led into these errors by a series of false assumptions:

—that the parent is a mere conduit for funds, whereas, he is the real party in interest.

—that public schools are neutral and therefore the choice of a nonpublic school is merely the choice of the same plus religion; whereas, in fact, the public school is not neutral, but, founded upon a secularist philosophy, it is hostile to the religious sensibilities of many of our citizens.

—that the activity aided by the statutory program is religion; whereas, the activity aided by the state is the free choice of education.

—that because government must be neutral with respect to religion, all activities of government-aided persons or institutions must be neutral; whereas, persons, whether parents or teachers, cannot and should not be neutral, but are entitled to freedom to choose with respect to education and religion and are also entitled to the encouragement, and not the hostility, of the state in these matters.

Act 92 avoids the three main evils against which the Establishment Clause was directed: sponsorship, financial support and the active involvement of the sovereign in religious activity. It meets all of the tests of constitutionality: secular legislative purpose, a primary effect that neither advances nor inhibits religion, and the avoidance of governmental entanglement with religion.

Although the district court did not find entanglement here, it is imperative that this Court shall not apply an alleged fourth test, the danger of political entanglement, to this case. Such a doctrine, founded upon the theory that matters which are likely to stir religious controversy must be denied a voice in the legislative forum, lest the controversy create bitterness and divisiveness, is contrary to the most basic principles of our democracy. It would silence those citizens who would petition for a redress of grievances, whenever, in the opinion of a court, their request might be expected to be met with opposition.

The better view, one more consistent with American ideals of freedom and pluralism, is to encourage freedom by encouraging diversity, and to do so by assisting the parent to exercise his freedom rather than by risking excessive governmental entanglement by direct assistance to schools.

If the action of the district court is not reversed many parents, particularly the poor, will be deprived of their

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right to choose the educators of their children, the public schools will be compelled to receive large numbers of additional and unwilling students to the great financial loss to all the taxpayers, and the great psychological loss to the entire community.

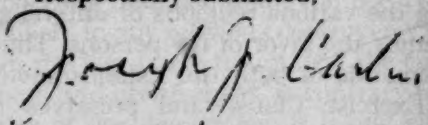
Differences, in the presence of mutual respect, produce peaceful coexistence. Differences, in the presence of efforts to suppress or coerce, produce bitterness and an end to the public peace.

The Pennsylvania Parent Reimbursement Act meets all of the lawful tests laid down by this Court. It recognizes that some aid is reasonably necessary if hard pressed parents are to be able to exercise their freedom in education; it provides that aid in amounts less than the total cost of the education, thus leaving room for that voluntary effort which is so important to freedom; it forbids any intervention by the state to regulate the schools, deeming the religious content to be a matter which properly belongs between the parent and the school; it makes the aid available to all parents who have chosen or may, in the future, choose any accredited nonpublic school, without discrimination between sectarian and nonsectarian choices, or among the various religious or anti-religious views which may enjoy the favor of the persons. Thus, Act 92 satisfies the demands of both the Establishment Clause and the Free Exercise Clause and preserves the government's neutrality while respecting the freedom of the person.

CONCLUSION

Your *amicus*, the City of Philadelphia, conscious of its heritage as the birthplace of liberty in America; aware of the profound value which its citizens place upon the right of religious freedom, and particularly freedom in education; confident, as a matter of principle and by reason of its experience, that schools of different kinds, public and non-public, sectarian and nonsectarian, can and will coexist in an atmosphere of mutual respect and harmony, so long as no attempt is made by either to destroy the others; realizing that the immense impact of inflation, of spiralling costs, and of burgeoning taxes, threatens to destroy the ability of parents, and especially poor parents, to exercise their sacred rights; and believing Act 92 of the Commonwealth of Pennsylvania is a statute well designed to protect the rights of all of its people and the educational opportunities of all of its children, without the use of means which would endanger religious freedom or create an excessive entanglement of governmental and religious institutions; respectfully and urgently moves this Honorable Court to reverse the decision of the district court and preserve this excellent statute.

Respectfully submitted,



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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

Nos. 72-459, 72-620

GRACE SLOAN, as State Treasurer of the Commonwealth of Pennsylvania,

—and—

JOSE DIAZ and ENILDA DIAZ, his wife, WILLIAM ZIMMERSPITZ and NANCY ZIMMERSPITZ, his wife, F. CARL KRETZMANN and KATHERYN L. KRETZMANN, his wife, ARTHUR HARVEY and MURIEL HARVEY, his wife, DANIEL F. X. POWELL and ANNA T. POWELL, his wife, SETH W. WATSON, JR., and ANNE P. WATSON, his wife,

Appellants,

v.

ALTON J. LEMON, NEAL F. BRACKEN, and BENJAMIN S. LOWENSTEIN,

Appellees.

HENRY E. CROUTER,

v.

Appellant,

ALTON J. LEMON, et al.,

Appellees.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIEF OF NATIONAL ASSOCIATION OF INDEPENDENT SCHOOLS, INC., AMICUS CURIAE

INTEREST OF THE AMICUS

This brief is submitted, with the consent of counsel for all parties, on behalf of the National Association of Inde-

pendent Schools, Inc. ("the Association"), a Massachusetts corporation.

The Association's membership comprises approximately 728 independent schools engaged in primary and secondary education, 28 state and regional school associations, 8 foreign and special purpose associations, 7 associations of administrators and teachers, 4 local school associations, and 4 denominational associations. Fifty-six of these member schools and two state associations are located in Pennsylvania.

Members of the Association include schools which in general terms may be categorized as either: (a) having no direct relationship of any kind with a religious group, some of these including in their programs, however, some religious observance varying in nature and degree from school to school; (b) affiliated with but not supported or controlled by a religious group; or (c) supported or controlled in varying degrees by a religious group. Schools in the latter two categories would be in the minority.

STATEMENT OF THE CASE

The United States District Court for the Eastern District of Pennsylvania has held unconstitutional the Parent Reimbursement Act (Act No. 92 of the Pennsylvania General Assembly, August 27, 1971, hereinafter, the "Act") which provides for a payment by the Commonwealth to parents of children who attended Commonwealth-approved nonpublic schools in order partially to reimburse those parents for the costs incurred in sending their children to nonpublic schools. The Act provides for the payment of the amount actually paid by the parent for tuition, up to a maximum of $75 per elementary school student and $150

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per secondary school student. The Act does not require the parents to use the money received in any particular way.

The Act became effective on August 27, 1971. On September 13, 1971 Appellees filed their complaint herein. Appellants moved to dismiss the complaint but their motion was denied by the District Court by Order filed April 6, 1972. The District Court concluded that the effect of the Act was to advance religion and that it therefore offended the Establishment Clause. The Court, by Order dated July 21, 1972, granted Appellees' motion for summary judgment and enjoined the making of any payments under the Act.

SUMMARY OF ARGUMENT

The major arguments advanced by Appellants are adopted by the Association without being repeated here, and it is believed those arguments fully sustain constitutionality of the Act.

However, if the Court should conclude otherwise, it is urged that the usual tests of constitutionality should properly be broadened to include an acknowledgment that the secular education provided by a religiously oriented nonpublic school is, as has been stated by this Court, "identifiable and separable" from any religious instruction component; that the providing of a substantial secular education by such a school is insured by reason of State requirements and supervision; that the State has a legitimate interest in aiding a parent who provides such a secular education, *considered as a whole,* and may do so by text books or cash, provided that any cash payment, as under the Act, is clearly less than the value, and only a fraction of the cost to the nonpublic school of furnishing the concededly secular education the school provides.

It is further urged that in light of prevailing economic and social conditions, the Act presents no threat of divisive-

ness; history of the Establishment Clause supports aid in the form provided since, among other thing, it affects no religious liberties; and the products of parochial education make it abundantly clear that they do in fact receive a secular education which substantially equals or exceeds that of public schools.

ARGUMENT

I.

THE ARGUMENTS ADVANCED BY APPELLANTS SUSTAIN THE CONSTITUTIONALITY OF THE ACT UNDER THE PRINCIPLES HERETOFORE ESTABLISHED BY THIS COURT.

Because the briefs of Appellants herein have, in the Association's opinion, so ably and thoroughly established the constitutionality of the Act under the principles heretofore enunciated by this Court, the Association has concluded that any further argument in support of the major positions taken by the Appellants could add little to the Court's consideration of the Act.

Nevertheless, and in spite of the Association's conviction that Appellants' presentation should clearly prevail, the Association considers the decision which the Court will make in this case to be so important as to justify a presentation of a variation in constitutional concept, to which the Association feels the Court should logically turn were it for any reason to question the perimeters established under earlier decisions as applied to the Act. The proposal which follows contemplates the Court's adoption of an alternative or supplemental test for determining constitutionality. This proposal is engendered by a determination to reveal all possible avenues open to the Court for sustaining the Act, rather than because of any lack of belief in the avenues which are made manifest by the Appellants in their briefs.

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II.

EVEN IF THE PRINCIPLES RELIED ON BY APPELLANTS WOULD NOT SUPPORT THE ACT, THE COURT SHOULD UPHOLD THE ACT BECAUSE THE STATE MAY AID THE SECULAR EDUCATION, CONSIDERED AS A WHOLE, WHICH NONPUBLIC SCHOOLS PROVIDE.

As stated above, the Association firmly believes that the tests relied on in the Courts' decisions in earlier Establishment cases, as presented by Appellants, fully support the Act. It is the Association's position, however, that even if tests established under such earlier cases did not satisfy the Court as to the constitutionality of the Act, the earlier cases point to and call for adoption by the Court of a supplemental test which should properly be used in determining the Act's constitutionality.

In essence, this supplemental test would demand simply whether the proposed State aid exceeded the value of the secular education, *considered as a whole,* which is provided by the nonpublic school, whether church related or not.

Such a test would acknowledge the right of a parent to have his child receive his State prescribed secular education as a concomitant of religious instruction (*Pierce*)[1]; it would acknowledge that essentially the same concomitancy could be legitimately furthered by the State, at the request of a parent, by making religious instruction a concomitant of a public school education through released time (*Zorach*)[2]. It would acknowledge that a bottle of milk contains just as much milk and cream when homogenized as when the two are separated. The test would also acknowledge the inter-

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[1]*Pierce* v. *Society of Sisters,* 268 U. S. 510 (1925).
[2]*Zorach* v. *Clauson,* 343 U. S. 306 (1952).

est of and supervision by a State in insuring a sound secular education, and the State's right to provide aid in furtherance thereof.

The only new element would be a recognition that the nonpublic secular education as a whole is more realistically identifiable *as a whole* than by its parts. Thus when the State provides aid in the form of books, even "secular books", it cannot necessarily be sure how the books will be used. But it does know, because of State established and administered standards for all nonpublic schools, that a qualifying school under the Pennsylvania Act will deliver a rounded secular education with the same secular essentials as provided by the public school system. It is this totality of secular education which the State must be allowed to use as the measure and object of its aid. It is this totality which the State can as clearly identify and aid, as it can the separate parts thereof which the Court has sanctioned in *Everson*,[3] *Allen*[4] and *Tilton*.[5] And it is this totality with which the Constitution must be truly concerned, far more than with the shredded parts heretofore categorized with such difficulty by the Court.

III.

THE SECULAR EDUCATION PROVIDED BY A NONPUBLIC SCHOOL IS SEPARABLE AND IDENTIFIABLE AS A WHOLE.

When *Pierce* decided that the Society of Sisters were engaged in an undertaking "long regarded as useful and meritorious" (268 U. S. 510, 534), and that a parent had

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[3] *Everson* v. *Board of Education*, 330 U. S. 1 (1947).
[4] *Board of Education* v. *Allen*, 392 U. S. 236 (1968).
[5] *Tilton* v. *Richardson*, 403 U. S. 672 (1971).

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a right to choose that form of education for his child, the Court pointed out:

> "The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." 268 U. S. 510, 535

And the Court in *Allen* explains and reaffirms the holding in *Pierce* by stating:

> "A premise of this holding [in *Pierce*] was the view that the State's interest in education would be served sufficiently by reliance on the secular teaching that accompanied religious training in the schools maintained by the Society of Sisters. Since *Pierce,* a substantial body of case law has confirmed the power of the States to insist that attendance at private schools, if it is to satisfy state compulsory-attendance laws, be at institutions which provide minimum hours of instruction, employ teachers of specified training, and cover prescribed subjects of instruction. Indeed, the State's interest in assuring that these standards are being met has been considered a sufficient reason for refusing to accept instruction at home as compliance with compulsory education statutes. These cases were a sensible corollary of *Pierce* v. *Society of Sisters*: if the State must satisfy its interest in secular education through the instrument of private schools, it has a proper in-

> terest in the manner in which those schools perform their secular educational function." 392 U. S. 236, 245-247

The Court adds:

> "Against this background of judgment and experience, unchallenged in the meager record before us in this case, we cannot agree with appellants either that all teaching in a sectarian school is religious or that the processes of secular and religious training are so intertwined that secular textbooks furnished to students by the public are in fact instrumental in the teaching of religion." 392 U. S. 236, 248

The conclusion is clear. There is secular teaching in a religiously oriented school. And it is secular teaching which meets State requirements. This is what makes it possible for the State to provide books in aid of such education without Establishment consequences.

In *Lemon*[6] the Court went on to affirm that the secular education found in the religious school is in fact identifiable as such:

> "The legislatures of Rhode Island and Pennsylvania have concluded that secular and religious education are identifiable and separable. In the abstract we have no quarrel with this conclusion". (613)

Lemon held the statutes there under consideration invalid because of their "excessive entanglement", a holding which in no way conflicts with the views here urged.

Given then an identifiable secular education, one guaranteed by legitimate State requirements and supervision,

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[6] *Lemon* v. *Kurtzman*, 403 U. S. 602 (1971).

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aid in support thereof, whether by books or cash, furnished to child or parent, presents no Establishment question if, in the case of the cash here involved, it does not exceed the value of the secular education.

IV.

PAYMENTS UNDER THE PENNSYLVANIA ACT ARE SUBSTANTIALLY BELOW BOTH THE VALUE TO THE STATE AND THE MINIMUM COST TO THE NONPUBLIC SCHOOL, OF THE SECULAR EDUCATION PROVIDED.

The legislative finding included in the Pennsylvania Act establishes that "the annual operating cost of educating" the nonpublic school children in the Pennsylvania public schools would be approximately $800 per annum per child. Added capital costs for facilities would be in excess of $1 billion, or $2,000 per pupil. It is therefore beyond the possibility of a doubt that the $75 which under the Act is paid with respect to an elementary school student, and the $150 with respect to a secondary school student, for the State qualifying secular education, is but a small fraction of what that secular education is worth to the State. Thus if the reimbursement is regarded, as it may be, in consideration of what has been provided by the parent, and the sum paid does not exceed market value, there is no Establishment issue, only a business transaction like any other purchase. The market value here would appear to be at least $800.

Even if the payment were not regarded as a purchase, but as some kind of aid, and even if regarded, contrary to our view, as aid to the school rather than to the parent, even so the reimbursement under the Act is but a small fraction of what it must cost the school to provide its State qualifying, secular education. This is apparent from the

fact that in 1969-70 the cost in the State of New York of providing a parochial elementary school education was $194, compared to the $75 paid under the Pennsylvania Act, and the cost of a parochial secondary school education was $435, compared to $175 paid under the Act.[7] Whether or not costs in Pennsylvania would be identical to those in New York, the range is so broad between the amount of reimbursement under the Pennsylvania statute, and the New York parochial schools' costs, as to leave no doubt that the reimbursement under the Pennsylvania Act is a fraction of the cost of the secular education provided no matter how it is measured.

Accordingly, it is clear that the Act, at the most, provides reimbursement which is but a fraction of the fair market value of the secular education provided, as well as being only a fraction of the *cost* of the secular education on which it is based. Whichever approach is used, there is no contribution to an Establishment. The Act is therefore clearly constitutional.

V.

THE ACT MEETS THE COURT'S PREVIOUSLY ESTABLISHED TESTS AND CONSIDERATIONS.

When the secular education provided by a nonpublic school is regarded as a whole, as here urged, the Pennsylvania Act is clearly constitutional.

The lower court did not question the genuineness of the legislative secular purpose any more than this Court questioned such purpose in *Lemon*. Also, it appears beyond question that the administration of the Pennsylvania Act

[7]Vol. 1, The Fleischmann Report on the Quality, Cost, and Financing of Elementary and Secondary Education in New York State, at 395 (The Viking Press 1973).

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involves no entanglement. This appears doubly insured because payment is to the parent after the transaction between the parent and the school has been completed and paid for.

This leaves only the test of whether the Act advances or inhibits religion. It does neither, since, as established above, payment is made only with respect to the secular education package provided by the nonpublic school, and the payment exceeds neither the value nor the cost of that package. Even if the aid were deemed to the school, nothing is left over to advance religion.

This Court has in recent cases referred to the threat of divisiveness which any aid to nonpublic schools, and presumably even to nonpublic school parents, might engender. But to anticipate any possible divisiveness from this Act would be clearly unjustified, for there is no evidence or common experience on which it can be based in the current situation. The best current indications are that economic matters assume preeminence in the public's mind today. Accordingly, when residents of the State of Pennsylvania who are not religiously inclined, understand that they may well be able to avoid additional public school annual operating costs of $400 million a year, and $1 billion in new capital costs, if they will provide the small sum in aid of nonpublic school parents called for under the Act, the most reasonable prediction is that the Act, far from being divisive, would be cheered. Clearly this is what the Legislature thought, and clearly it is what the City of Philadelphia believes, as appears from the *amicus* brief filed on its behalf.

The City's brief makes it apparent that the real divisiveness to be feared would be that resulting from a failure to give legitimate aid to nonpublic school parents, with the inevitable result of the transfer by such parents of their children to the public schools. For this would be against the will and against the conscience of such parents, and they could be expected to seek redress within the public school

system. Thus the City concludes that the transfers, in addition to the prohibitive costs involved for the State, would cause "chaos" in the City's school system.

Thus to rely on history to establish the likelihood of divisiveness under today's conditions can be extremely misleading. Not only is the economic climate today, as stated above, such as to preclude divisiveness from what the Pennsylvania Act provides, but, in addition, public attitudes toward parochial schools are today very different from what they have been. The United States has elected a Catholic President. Parochial schools are ever more staffed by lay teachers, many of different or no faith. All of these factors present a new situation and one which denies the existence of any basis for a prediction of divisiveness.

This Court in its rationale under the *Allen* case, found absence of establishment in part from the fact that books were distributed to all children, those in nonpublic schools as well as those in public. Concededly, under the Pennsylvania statute, reimbursement is provided only as to the nonpublic sector. But this does not serve to distinguish the holding in *Allen*. For certainly the reason the public sector is not included is because it has already been fully provided for. Realistically, on this point, it can be said that this Act is on all fours with *Allen* because it, for the first time, begins to make universal the aid provided for education by adding some aid in the nonpublic sector.

VI.

SOME APPARENT ASSUMPTIONS OF EARLIER DECISIONS WHICH REQUIRE REVIEW.

Historical: Professor Mark DeWolfe Howe's scholarly treatise on the history of the Establishment Clause[8] provides

[8]Howe, Mark DeWolfe, The Garden and the Wilderness (The University of Chicago Press, 1965)

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two highly significant observations as to the difficulties which the Court has faced because of the dual historical genesis of the clause, and the overemphasis which has been placed upon one of its two conflicting objectives:

> "For the prohibition is not only against the enactment of laws respecting an establishment of religion; it is against the making of laws prohibiting its free exercise. The specificity of this second assurance makes it clear beyond controversy that the framers could not have intended the policy of separation, enunciated in the prohibition of establishment, to frustrate or inhibit the religious experience. The Court's endeavor in recent years, accordingly, has been to discover some means by which it may vigorously enforce a Jeffersonian principle of separation while, at the same time, it protects the conscience of the individual. In seeking to have it both ways—to safeguard the conscience of individuals and to prevent aid to religion—the Court's tendency has been to look upon its task as that of blending a secularist's rule of separation, derived from Jefferson, with a believer's rule of freedom, derived from Roger Williams. It has failed sufficiently to recognize, I think, that the rule of separation was no less a postulate of faith than it was an axiom of doubt. If one is to respect the realities of history in formulating rules of constitutional law, it is not as easy as the Court has pretended it to be to cast out the theology of the First Amendment.
>
> * * *
>
> "Yet the Supreme Court, by pretending that the American principle of separation is predominantly Jeffersonian and by purporting to outlaw even *those aids to religion which do not affect religious liberties,* seems to have endorsed a governmental policy aimed

> at the elimination of *de facto* establishments. *The Court too often has allowed itself to become involved in an exercise in scholastic domgatism—a venture in the acrobatics of logic which cannot, for very long, have an important effect on the actualities of American life."* (Emph. added) The Garden and the Wilderness, at 10, 12.

If Prof. Howe's conclusions are justified, there would appear no historical reason for denying the aid which the Act would provide. The Act affects no religious liberties.

Factual: The opponents of nonpublic educational aid have drenched the Court with details of religious control and religious permeation in some parochial schools to a point where antipathy for the religious forms is reflected in some court opinions. Such presentations seem to imply that the product of a parochial education must be some sort of a warped monster, and the parochial educational system —even in its admitted secular aspects—something against which the Establishment Clause must be invoked for protection.

Certainly if parochial education was in some way twisting, subverting, or even denying a sound education to its charges, this might well be a factor which the Court would take into account—consciously or unconsciously—when involved in the blurred area of Establishment. It is perhaps worthwhile, therefore, to call this Court's attention to Prof. Choper's summary (set forth in the appendix) of an exhaustive study which shows, in general, that the products of the Catholic school system fully measure up to both Catholics and nonCatholics who attended public schools, and that they in fact have an edge in some important areas.

Above all, the summary leaves no doubt that parochial schools, as evidenced by their product, do provide a very sound package of general secular education, and one which

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constitutes appropriate subject for state aid where, as in the case of the Act, the aid is so demonstrably in an amount less than the value and cost of the secular education provided so that it can carry no possible realistic support for any kind of establishment.

CONCLUSION

Pennsylvania Act 92 provides reimbursement for part of the cost of the secular education provided by nonpublic schools, and in the case of religiously oriented schools, the secular education guaranteed by State requirements is separable and indentifiable. The Act, therefore, involves no constitutional violation.

Dated: March 20, 1973

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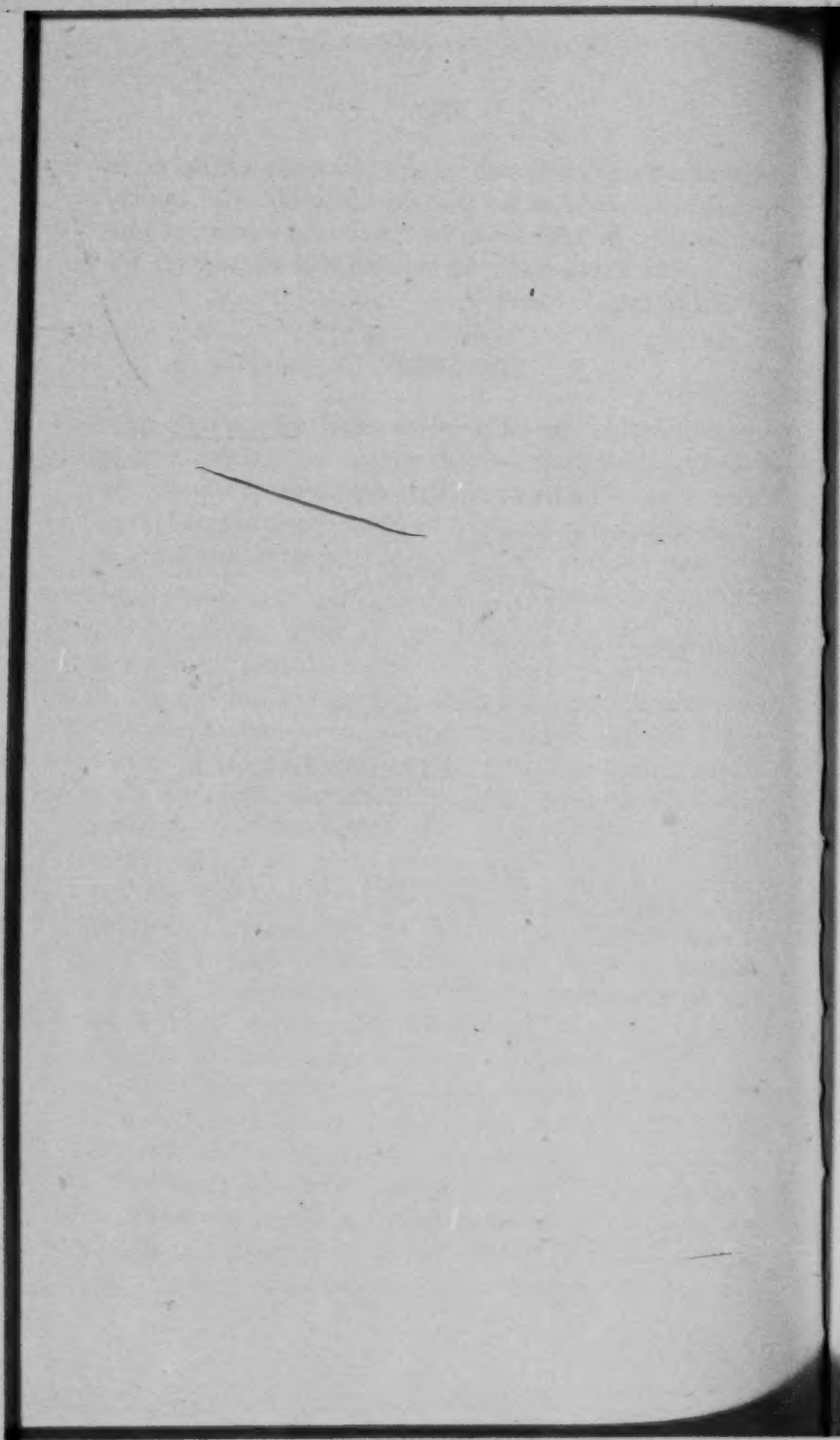

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APPENDIX

J. Choper, Establishment Clause and Aid to Parochial Schools, 56 California Law Review 260 at footnote 223 (1968)

Such a major sociological study, comparing Catholic school Catholics and public school Catholics, entitled The Education of Catholic Americans, by Andrew M. Greeley, a Catholic priest, and Peter H. Rossi, a Protestant, was published in 1966 under the auspices of the National Opinion Research Center.

The monograph lends support to the contention just discussed in text accompanying note 222 *supra*. Among the controlled findings were that Catholic school Catholics increased their social class margin over other Catholics, id. at 57; that those who went to Catholic primary schools were more likely to graduate from high school than other Catholics and were just about as likely to do so as public school Protestants, id. at 49-50; that those who went to Catholic high schools were more likely to go to college than Catholics and almost all classes of Protestants who went to public high schools, id. at 50; that Catholic school Catholics scored significantly higher on a brief general knowledge test than did public school Catholics, id. at 120; that Catholic school Catholics ranked measurably higher on an occupational-prestige index than did public school Catholics, id. at 140. The authors conclude that "there is no evidence that Catholic education interferes with occupational or educational achievement." Id. at 146. Relevant thereto is the judgment of Catholic high school Catholics indicating that their schools are no more "repressive" or "authoritarian" than other schools. "There are no significant differences in the proportions saying they are free to disagree in class, that all students are treated equally, or that they are free to talk to the teacher if they think they

have been treated unfairly. Indeed, in two of the three instances, the slight associations that do exist suggest that Catholic schools may be somewhat *more* liberal in these matters." Id. at 193.

The survey also revealed interesting results as to attitudes. It found no evidence that Catholic school Catholics were less tolerant of members of other groups, id. at 122; were less likely to defend civil liberties, were more given to extremist religious attitudes or to distrusting world and wordly effort, or were more rigid in their child-rearing practices, id. at 125; that, while Catholic school Catholics do interact less with other Americans while in school, this does not continue in later life, id. at 121. Other studies have shown that differences between Catholic and non-Catholic schooling, in respect to such matters as participation in the community, values concerning occupational achievement, or the political goals of American society, are nonexistent. See J. Fichter, Parochial Schools: A Sociological Study 116 (1958); Rossi & Rossi, Some Effects of Parochial School Education in America, 90 Daedalus 300 (1961); Rossi & Rossi, Background and Consequences of Parochial School Education, 27 Harv. Educ. Rev. 195 (1957). See also A. Greeley & P. Rossi, the Education of Catholic Americans 8-9 (1966).

Finally, it must be observed that the Catholic school education did produce religious consequences. Catholic school Catholics were more likely to engage in sacramental activity, id. at 56-57, 71, were more "loyal" to the ecclesiastical system, id. at 60, were better informed on the "fine points" of religious knowledge, id. at 61, and were more orthodox in their moral beliefs, id. at 63. See also Kelley, *"Protestants and Parochial Schools"*, in Federal Aid and Catholic Schools 71, 77 (D. Callahan ed. 1964).

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Nos. 70-666, 70-735

GRACE SLOAN, etc.,

Appellant,

and

DIAZ, *et al.*,

Intervenors-Appellants,

v.

ALTON J. LEMON, *et al.*,

Appellees.

On Appeal from the United States District Court
for the Eastern District of Pennsylvania

BRIEF OF AMERICAN JEWISH COMMITTEE, AMERICAN JEWISH CONGRESS, ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH, CENTRAL CONFERENCE OF AMERICAN RABBIS, NATIONAL COUNCIL OF JEWISH WOMEN AND UNION OF AMERICAN HEBREW CONGREGATIONS, *AMICI CURIAE*

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Supreme Court of the United States

October Term, 1972

Nos. 72-459, 72-620

GRACE SLOAN, etc.,

Appellant,

and

DIAZ, *et al.*,

Intervenors-Appellants,

v.

ALTON J. LEMON, *et al.*,

Appellees.

On Appeal from the United States District Court for the Eastern District of Pennsylvania

BRIEF OF AMERICAN JEWISH COMMITTEE, AMERICAN JEWISH CONGRESS, ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH, CENTRAL CONFERENCE OF AMERICAN RABBIS, NATIONAL COUNCIL OF JEWISH WOMEN AND UNION OF AMERICAN HEBREW CONGREGATIONS, *AMICI CURIAE*

This brief *amici curiae* is submitted with the consent of the parties.

Statement of the Case

The statute under attack is Act 92 of the Laws of Pennsylvania, 1971, known as the Parent Reimbursement Act for Nonpublic Education, 24 P.S. §5701, *et seq.* (re-

ferred to herein as "the Act"). Section 2 of the Act recites as a "Legislative Finding" and "Declaration of Policy" that parents who send their children to nonpublic schools assist the State in reducing the rising costs of public education but that the "impact of inflation, plus sharply rising costs of education, now combine to place in jeopardy the ability of such parents fully to carry this burden." Should nonpublic school parents be forced by economic circumstances to transfer their children in substantial number to nonpublic schools, it is said, an enormous burden would be placed upon the public schools and upon the taxpayers of the state. Section 2 then estimates the economic consequences of such transfers and concludes that such costs would "be an intolerable public burden and present standards of public education would be seriously jeopardized." Therefore, "to reimburse parents partially for this service so vitally needed by the Commonwealth, and in order to foster educational opportunity for all children," the Act establishes a Parent Reimbursement Fund. The Fund is to be administered by the Pennsylvania Parent Assistance Authority consisting of five members appointed by the Governor.

Under the provisions of the Act, beginning July 1, 1971, 23% of the revenues collected under the Pennsylvania Cigarette Tax Act are to be paid into the State Treasury to the credit of the Parent Reimbursement Fund. Sums in the Reimbursement Fund are to be distributed to the parents of any child attending a nonpublic school within the state which fulfills the compulsory school attendance law and which meets the requirements of Title VI of the Civil Rights Act of 1964 (Public Law 88-352). Upon the filing

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of a verified statement by the parent at the end of the school year, a payment of $75 for each elementary school child and $150 for each secondary school child is to be made by the Authority not later than September 15 of the following school year. In the event the tuition paid or contracted to be paid is less than $75 or $150, the lesser sum is to be repaid.

Appellees, who are citizens, residents and taxpayers in Pennsylvania purchasing cigarettes in the state (one being also the parent of a Negro child attending public school), challenged the Act in the United States District Court for the Eastern District of Pennsylvania. Appellees' complaint, filed on September 13, 1971, contended that the Act on its face and as applied is a law respecting the establishment of religion in violation of the First and Fourteenth Amendments to the Constitution of the United States in that it finances religious instruction and worship; has as its purpose the advancement of religion; has as its primary effect the advancement of religion; gives rise to and intensifies political fragmentation and divisiveness on religious lines, and prefers those religions and sects which operate a parochial school system.

The complaint also alleged with respect to the First and Fourteenth Amendments that the Act on its face and as construed would prohibit the free exercise of religion in that it constitutes compulsory taxation for the support of religion and discriminates against and weakens those religions which do not choose to operate, or cannot afford to operate, a parochial system of education.

Finally, the complaint alleged that the Act violates the Equal Protection Clause of the Fourteenth Amendment to

the Constitution by perpetuating and promoting the segregation of the races.

The complaint sought the convening of a three-judge court to declare the Act unconstitutional and enjoin its enforcement and a preliminary injunction pending trial of the issues.

In November 1971, the appellant State Treasurer moved to dismiss, arguing that the Act was constitutional and that the complaint failed to show the Establishment Clause and Free Exercise claims ripe for decision. The appellant also denied that the Act resulted in discriminatory state action or invidious classification and asserted that insufficient facts were alleged to show such a claim ripe for decision. Finally, the appellant challenged appellees' standing to sue.

A three-judge court was impanelled. Parents of nonpublic school students were permitted to intervene on the ground that their claims and defenses were distinct from those of the State Treasurer.

On April 6, 1972, the three-judge court unanimously denied the motion to dismiss. In its opinion the court concluded that the Act violated the Establishment Clause because it unconstitutionally aided sectarian schools and supported religion by aiding parents in providing their children with a religious education. Having ruled that the Establishment Clause precluded state reimbursement of sums paid as tuition to schools providing religious education, the court did not consider the Free Exercise and Equal Protection claims of the complaint or arguments relating to standing.

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On May 2, 1972, appellant and parent-intervenors filed answers to the appellees' complaint. Appellees then moved for summary judgment which was granted by the three-judge court on July 21, 1972 in accordance with its opinion of April 6.

Interest of the *Amici*

This brief is submitted in behalf of the following national Jewish organizations:

American Jewish Committee
American Jewish Congress
Anti-Defamation League of B'nai B'rith
Central Conference of American Rabbis
National Council of Jewish Women
Union of American Hebrew Congregations.

Each of these organizations is concerned with preservation of the security and constitutional rights of Jews in America through preservation of the security and constitutional rights of all Americans. They are committed to the belief that separation of church and state is the surest guarantee of religious liberty and has proved of inestimable value both to religion and to the community generally. They submit this brief because they believe that the program provided for in the statute under review is a form of aid to religious institutions, bringing in its train the evils that the constitutional guarantee of separation of church and state was designed to prevent.

In addition, these organizations, which have consistently fought for equal opportunities for all, regardless of race,

color, creed or national origin, and which have always opposed racial segregation in schools, believe that grants of public funds to private schools as authorized by the Act would adversely affect the public schools and thereby stimulate the trend toward racial segregation in the schools of Pennsylvania, with private schools attended almost exclusively by white pupils and the public schools attended by most of the nonwhite children. The *amici* view this effect of the Act as a violation of the Equal Protection Clause of the Fourteenth Amendment.

Questions to Which This Brief Is Addressed

This brief *amici curiae* is addressed to the following questions:

1. Does the Act violate the Establishment Clause of the First Amendment because it does not have a valid secular purpose or effect?

2. Does the Act violate the Establishment Clause because it fosters an excessive governmental entanglement with religion?

3. Does the Act, in so far as it authorizes the payment of public funds to those private schools that are racially segregated, violate the Equal Protection Clause of the Fourteenth Amendment?

4. Does the appellee Lemon have standing to raise the question as to Equal Protection?

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Summary of Argument

I. The Act violates the Establishment Clause of the First Amendment because it has neither a valid secular purpose nor an effect which does not advance religion.

A. The court below accepted the legislative findings in the Act as virtually precluding inquiry into its legislative purpose. In light of clear evidence that the purpose of the Act is to keep religious schools in existence as religious institutions, such blind acceptance of the legislative findings to the contrary has the effect of nullifying the constitutional requirement that legislation assisting religious institutions have a secular legislative purpose.

B. The tuition payments provided for by the Act constitute an indirect form of governmental aid to nonpublic schools, most of which are religiously affiliated. They therefore violate the constitutional prohibition of governmental action which has the effect of advancing religion. There is no significant difference between the tuition grants involved here and direct financing of sectarian schools out of tax-raised funds.

II. The Act violates the Establishment Clause because it fosters an excessive government entanglement with religion, both administrative and political. The aid plan embodied in the present Pennsylvania law has the same potential for political divisiveness along religious lines as the plans previously stricken down by this Court. This is particularly true with respect to the danger of entanglement of religion and government in the political process.

III. In so far as the Act authorizes the payment of public funds to private schools that are racially segregated, it violates the Equal Protection Clause of the Fourteenth Amendment.

A. There is ample evidence that the private schools which are beneficiaries of funds under the Act are racially segregated.

B. The use of public funds to maintain and perpetuate such racial segregation is prohibited. The tuition reimbursement formula embodied in the Act constitutes such an illegal use of public funds.

IV. Appellee Lemon, the father of a black child in a Pennsylvania public school, has standing to raise the question of equal protection.

ARGUMENT

POINT I

The Act violates the Establishment Clause of the First Amendment because it has neither a valid secular purpose nor a primary effect which does not advance religion.

The precise meaning of the Freedom of Religion and No-Establishment Clauses of the First Amendment, like other broad constitutional guarantees, has always been and may always be subject to dispute. Nevertheless, since this Court's now classic formulation of the reach of the Establishment Clause in *Everson* v. *Board of Education*, 330 U.S.

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1 (1947), certain tests of constitutional validity have accumulated under which particular programs must be assayed.

Chief Justice Burger stated in *Lemon* v. *Kurtzman, Earley* v. *DiCenso,* 403 U.S. 602, 612 (1971):

> In the absence of precisely stated constitutional prohibitions, we must draw lines with reference to the three main evils against which the Establishment Clause was intended to afford protection: "sponsorship, financial support, and active involvement of the sovereign in religious activity." *Walz* v. *Tax Commission,* 397 U.S. 664, 668 (1970).

Three main tests, the Chief Justice continued, could be gleaned from prior cases (at 612-13):

> First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, *Board of Education* v. *Allen,* 392 U.S. 236, 88 S. Ct. 1923, 1926, 20 L. Ed. 2d 1060, 1065 (1965); finally, the statute must not foster "an excessive government entanglement with religion." *Walz, supra,* at 674, 90 S. Ct. at 1414, 25 L. Ed. 2d at 704.

In *Lemon-DiCenso,* this Court invalidated, on the ground of excessive "entanglement," statutes in Pennsylvania and Rhode Island providing for use of state funds to pay for carefully defined secular aspects of the operations of religiously affiliated schools. The two Acts, with their elaborate provisions for state supervision to insure that the money was not used for sectarian purposes, had quite obviously been designed on the assumption that transfer of public funds to such schools, directly or indirectly, was barred by the Establishment Clause. This was true either under the oft-repeated interpretation of that Clause in

Everson v. *Board of Education,* 330 U. S. 1, 16 (1947) that "no tax in any amount, large or small, can be levied to support any religious activities or institutions," or under the more recent statement in *Walz* v. *Tax Commission,* 397 U. S. 664, 668 (1970) barring "financial support" of religious activity.

In *Lemon,* this Court found that the provisions in the two statutes designed to avoid the appearance of "financial support" of religious activities had created undue entanglement which rendered the statutes invalid. The present Pennsylvania statute, like others enacted since *Lemon,* attempted to avoid the strictures of that opinion by giving financial assistance to the schools, via parents and children, on the theory that the entanglement hurdle was the only obstacle to validation. We submit that this attempt cannot succeed. The new Pennsylvania law, by limiting administrative entanglement, has provided for the simple, though indirect, transfer of state funds to religiously affiliated schools, with no restraints on their being used for religious purposes. Such a transfer must necessarily have both a religious purpose and a religious effect and must therefore violate two of the tests laid down in *Abington School District* v. *Schempp,* 374 U. S. 203 (1963) and reaffirmed in *Walz* and *Lemon-DiCenso, supra.*

In a number of recent lower court decisions, it has been pointed out that there is no way around the dilemma created by the purpose and effect and the entanglement tests since the less the state attempts to restrict and control public funds to escape the entanglement prong, the greater the likelihood that the state supplied funds will be used

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for religious as well as secular purposes. See, *e.g.*, *Wolman* v. *Essex*, 342 F. Supp. 399, 414 (S.D. Ohio 1972), *aff'd, mem.* 93 S. Ct. 61 (1972); *Americans United for Separation of Church and State* v. *Oakey*, 339 F. Supp. 545, 549-50 (D. Vt. 1972).

There is nothing surprising about this. It is merely a reflection of the fact, taken for granted until quite recently, that the Constitution bars government from resorting to any device to use its resources to finance religious institutions.

A. The Sectarian Purpose

In the case at bar, the court below concluded that the Act expressed a "legitimate secular objective consistent with the Establishment Clause," basing its conclusion upon the stated legislative purpose of the Act: to aid parents to continue to send their children to nonpublic schools, thereby fostering educational opportunities for both public and nonpublic schools. *Lemon* v. *Sloan, et al.*, 340 F. Supp. 1356, 1360 (E.D. Pa., 1972). The court also took note of legislative findings expressed by the General Assembly and its declaration of policy that present standards of public education would be seriously jeopardized if parents of nonpublic school children could no longer afford tuition costs and were forced to send their children to public schools. The court then accorded this stated legislative intent "appropriate deference" and declared that the Act passed the first test of a "secular purpose."

We note also that this Court in *Lemon* v. *Kurtzman*, *supra*, accorded similar deference to the stated legislative

intent of the Acts there considered, although they were nevertheless invalidated on other grounds. In discussing the secular legislative purpose test, the court said it had no reason to believe that the Pennsylvania and Rhode Island Legislatures meant anything other than they said, and that nothing before the Court undermined those stated legislative intents (403 U.S. at 613).

We submit, nevertheless, that, notwithstanding traditional deference to the legislatures, it would be naive to unquestionably accept as the purpose of any Act whatever language the draftsmen put in the preamble. To decline even to consider piercing the veil of a state's legislative intent is to permit subversion of the Constitution through the recitation of a formula preamble or statement of purpose.

It can hardly be denied that the Pennsylvania Legislature, in enacting the Pennsylvania Reimbursement Act for Nonpublic Education, was concerned not with standards of *public* education, but with the continued existence of the parochial schools of that state. We have been repeatedly told that parochial schools everywhere are in financial difficulties. We know that legislation has been enacted in numerous states for the very purpose of preserving these schools. It should not be necessary to review the impassioned pleas of parents and school officials, particularly as reported in the press, urging that aid be given so that church-related schools may remain financially viable. The plea is *for* the church-related schools, which are felt by those pressing for government aid to be the cornerstone of their church's mission. If the public schools are mentioned at all in these pleas, it is only in warnings that, if

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public aid is not forthcoming, the public schools will be inundated by students from private institutions forced to close their doors. This threat, we submit, is speculative. Its validity has not yet been demonstrated in any state.

We submit that the court below erroneously passed over the question whether the Act does indeed have a secular purpose. More broadly, we suggest that this Court spell out more clearly the meaning of the "secular purpose" test, lest it become deadletter. The lower courts appear to be treating it as such.

Thus, in *Wolman* v. *Essex, supra,* a three-judge court held (342 F. Supp. at 411) that Ohio's Parental Reimbursement statute satisfied the secular purpose test because nonpublic schools perform in substantial part a strictly secular function. The state was also said to have a legitimate concern in requiring minimum standards in all of its schools and the Ohio statute was passed with the express purpose of helping nonpublic schools maintain these standards. The court then commented, in footnote 13 (at 411), that, in its opinion, "the first prong of the *Lemon* test will almost invariably be satisfied in cases of this type and may not truly exist as a distinct, dispositive requirement."

Similarly, in *Committee for Public Education and Religious Liberty* (*PEARL*) v. *Nyquist,* 350 F. Supp. 655, 660 (S.D.N.Y. 1972), probable jurisdiction noted, 93 S. Ct. 962 (1972), District Judge Gurfein, writing for the majority, stated: "In sum, we do not go behind the statements of the New York Legislature, although it is manifest that, regardless of the variety of secular arguments advanced to

support the legislation, *the prime legislative concern is to see that religious parochial schools do not go under for lack of financial support.*" (Emphasis added.)

We submit that the "purpose" test laid down by this Court should not be treated so cavalierly and that, where a "prime legislative concern" to preserve religious schools through the use of government resources is clear, it should not be ignored merely on the basis of *pro forma* recitations in legislative findings. Moreover, while a state surely has a legitimate concern in requiring minimum standards in all schools, it is not the business of the state, we submit, to provide public funds to enable schools established for religious purposes to maintain such standards. To allow the state to do this would deprive the "secular purpose" test of meaning.

B. The Sectarian Effect

The court below struck down the Act under the second prong of the *Lemon* test. It concluded that the effect of the Act was to aid religious schools and that the failure of the state to insure that funds were restricted to secular education or general welfare services rendered the Act unconstitutional (at 1364). It observed that the legislative findings and declaration of policy acknowledged that this type of aid would have the *effect* of enabling nonpublic schools, including church-related schools, to continue to operate (at 1363), even though it failed to hold that this was the *purpose* of the Act.

Nevertheless, the language of the opinion below lends credibility and support to our argument above concerning

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purpose. In the portion of its opinion considering the effect of the Act (at 1364), the court stated:

> If parents cannot afford to pay the tuition, they must take their child out of the nonpublic schools and if enough parents are unable to pay these costs, the schools will be forced to close. It was precisely this possibility that led the Pennsylvania General Assembly to pass the Act under review. By providing parents with additional funds because they have paid tuition at nonpublic schools, the Commonwealth is trying to insure the continued ability of the parents to afford tuition costs and therefore the continued existence of nonpublic schools, including sectarian schools.

Be that as it may, the opinion below concluded, first, that sectarian schools would be aided by state funds under the Act and, second, that the Act also unconstitutionally supported religion because it aided parents in providing a religious education for their children. We submit that both of these analyses are correct.

It is beyond dispute that tuition reimbursement will facilitate and promote the enrollment of children at church-related schools, schools which constitute an integral part of the religious mission of the sponsoring churches. It was argued below by appellants that, in the absence of earmarking, one could not ascertain that payments under the Act would encourage such enrollment. The lower court quite rightly rejected that contention, saying (at 1364):

> It is clear that a possible and quite likely use of the aid under review is to enable parents to continue to pay tuition at sectarian schools. Tuition payments support both religious and secular education at these schools. The mere fact that the Act does not require

> that parents use the funds to pay tuition at church-related schools does not relieve the state of its duty to preclude the use of its funds to support religious activities.

This statement was bottomed on the conclusion of this Court in *Tilton* v. *Richardson*, 403 U.S. 672, 682-84 (1971), that a government aid program can be invalidated on the basis of a significant risk that the aid may serve to support religious activity at some future time.

Wolman v. *Essex, supra,* which should be dispositive of the instant case, declared (342 F. Supp at 416) that:

> The state cannot claim it does not know what the parents will do with their grants, for the expressed intent of the statute is to "reimburse parents of nonpublic school children for a portion of the financial burden experienced by them" in sending their children to parochial schools. It does not matter that the parents are subsequently free to use the money received for any purpose. The intent of the statute in providing the reimbursement must speak for itself. (Citations omitted.)

The *Wolman* opinion noted that, during the 1970-71 school year, 98% of the students attending nonpublic schools in Ohio attended denominational schools and that approximately 95% attended Catholic schools. Similarly, the Report of the New York State Commission on the Quality and Financing of Elementary and Secondary Education disclosed that 93% of private school students attend religious schools. In Pennsylvania, 96.6% of private school pupils attend church-affiliated schools.[1] It is a matter of

1. Statistics on Nonpublic Elementary and Secondary Schools, 1965-1966, Office of Education, U.S. Dept. of Health, Education and Welfare, OI-210111.

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public cognizance that of students attending church-affiliated schools, in state after state, one organized religious group is the predominant beneficiary of all parochiaid legislation. (See also *Americans United for Separation of Church and State* v. *Paire,* 348 F. Supp. 506, 509-10 (D.N.H. 1972)).

The lower court in *Wolman,* which invalidated Ohio's tuition reimbursement statute, thought that the second prong of the *Lemon* test, the principal or primary effect of the statute, was really a restatement of the neutrality test, first discussed in *Everson, supra,* and later reformulated in *Abington School District* v. *Schempp,* 374 U.S. 203 (1963). "One method of gauging neutrality, in terms of the Religion Clauses," said the *Wolman* opinion, "is to observe the class to which it is directed and that will be affected by it." Although the court did not base its holding entirely upon the second prong of the *Lemon* test, it observed that (at 412):

> In all the cases in which the Court has upheld legislation attacked on Establishment Clause grounds, the affected class has been substantially broader than the class affected by the Ohio statute. * * * In each of these cases religiously affiliated institutions were among a broad class of beneficiaries deriving benefits of a general, broad-based, public policy. These cases are truly analogous to situations in which the state provides police and fire protection generally to all people and property, within its jurisdiction, regardless of religious affiliation.

Thus, the breadth of the class to be benefited is of overriding importance.

In the case at bar, the lower court took care to stress that it could perceive no constitutional difference in whether payments were made directly to the church-related school, indirectly using parents as a conduit, or in the form of reimbursement to parents with dollars that need not necessarily be used at the educational institution. For, said the court with careful logic (at 1365):

> The economic consequences are the same for the church-related school whether it receives funds through a direct grant, a conduit plan or because the state increases family incomes through a reimbursement program which enables the parents to continue to pay tuition. In each case, tax-raised funds are being used to subsidize religious education.

There is ample precedent for this reasoning. In fact, state courts have invariably invalidated tuition grant plans in which public funds were to be paid to parents. See *Almond* v. *Day*, 197 Va. 419, 89 S.E. 2d 851 (1955); *Hartness* v. *Patterson*, 179 S.E. 2d 907 (S. Carolina 1971); *Swart* v. *South Burlington School District*, 122 Vt. 177, 167 A. 2d 514, *cert. den.* 366 U.S. 925 (1961); *Opinion of the Justices*, 259 N.E. 2d 564 (Mass. Sup. Jud. Ct., 1970). Similarly, the three-judge court in *Wolman, supra*, whose holding was affirmed by an 8 to 1 vote of this Court, stated (342 F. Supp. at 415):

> Payment to the parent for transmittal to the denominational school does not have a cleansing effect and somehow cause the funds to lose their identity as public funds. While the ingenuity of man is apparently limitless, the Court had held with unvarying regularity that one may not do by indirection what is forbidden directly; one may not by form alone contradict the substance.

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(The *Wolman* opinion then went on to recall that a variant of the indirection principle was attempted in certain Southern states where monetary grants were made to parents or students for use at so-called "private schools." These attempts to avoid the constitutional obligation to desegregate the public schools of these states were uniformly disallowed. See, e.g., *Griffin* v. *School Board of Prince Edward County*, 377 U.S. 218 (1964); *Lee* v. *Macon County Board*, 267 F. Supp. 458 (1967), *aff'd sub nom. Wallace* v. *United States*, 389 U.S. 215 (1967); *Poindexter* v. *Louisiana Financial Assistance Commission*, 296 F. Supp. 686 (1968), *aff'd* 393 U.S. 17 (1968). Although these decisions rejecting tuition grants arose under the Equal Protection Clause, rather than the Establishment Clause or its state equivalents, the principle is analogous. As Justice Douglas noted in *Abington, supra*, 374 U.S. at 230, "[I]t is the use to which public funds are put and not to whom they are provided that is controlling.")

The *Wolman* opinion concluded (342 F. Supp. at 417) that, "Since the potential ultimate effect of the scheme is to aid religious enterprises, the Establishment Clause forbids its implementation regardless of the form adopted in the statute for achieving that purpose." That is precisely the point we wish to emphasize.

It is clear from *Lemon-DiCenso* that payments of public funds may not be made directly to religious schools, and no one would now argue the constitutional validity of direct money grants to such institutions. Nevertheless, it is argued that the strictures of *Lemon-DiCenso* may be avoided either if sums are paid to parents functioning as

conduits or channels to the religious schools, or if sums are paid to parents in reimbursement for tuition paid without any requirement that they actually be used for payment of tuition.

We submit, however, that *Wolman* stands for the common-sense proposition that it is irrelevant what method the state uses to advance religious enterprises, when the economic consequences are the same for all concerned. This point was also made by Judge Hays in *PEARL* v. *Nyquist, supra,* dissenting opinion, at 675, when he said:

> There is no essential difference between a parent's receiving a $50 *reimbursement* for tuition paid to a parochial school and his receiving a $50 *benefit because* he sends his child to a parochial school. In both instances the money involved represents a charge made upon the state for the purpose of religious education. [Emphasis in original.]

It is also important to remark upon the unanimous holding of the three-judge Federal District Court in Ohio which had before it a tax credit plan for nonpublic school parents following *Wolman's* invalidation of the parental reimbursement statute. In the Ohio tax credit case, entitled *Kosydar* v. *Wolman,* Civil Action No. 72-212 and *Wolman* v. *Kosydar,* Civil Action No. 72-222, the court reaffirmed the *Wolman* holding that direct monetary grants to the parents of nonpublic school children violate the First Amendment, and then proceeded to a consideration of whether the state may nevertheless, through its taxing machinery, confer benefits by way of tax credits upon a class of persons composed of nonpublic school parents and an additional minor segment of the public school population. (In re-

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sponse to language in the *Wolman* opinion, an attempt was made to broaden the class of recipients for aid under the new tax credit legislation. These recipients included persons enrolled in home instruction programs, in public adult high school continuation programs and in schools for tubercular persons; persons enrolled in vocational and basic literacy programs; persons paying non-resident public school tuition payments; and students enrolled in public or private programs for the deaf, blind, crippled, emotionally disturbed, neurologically handicapped or mentally retarded. However, the benefited class, as the court noted, was nonetheless of a predominantly sectarian character.) Again, for the reasons outlined in *Wolman,* the court held the tax credit statute unconstitutional.

Said the court (at 25, Slip Opinion):

> It simply defies reason to say that such a statute does not aid sectarian schools. Such aid may be less direct and less capable of precise measurement than a grant to the schools themselves; yet, if some parents will now be able to send their children to these schools or if fewer parents already utilizing them will be forced to withdraw their children, they will be aided.
>
> * * *
>
> We hold that where, as here, the recipient of state conferred benefits is a predominantly sectarian class of schools and therefore as a matter of law the primary effect of such benefits is to advance religion, then the form of these benefits, whether by tax credits, exemptions or deduction, cannot alone insulate them from First Amendment infirmity. * * * The exaltation of form over substance no longer has any place in our jurisdiction. (Citations omitted.)

POINT II

The Act violates the Establishment Clause because it fosters an excessive governmental entanglement with religion, both administrative and political.

In *Lemon-DiCenso, supra,* this Court invalidated Pennsylvania and Rhode Island Acts because the "cumulative impact of the entire relationship arising under the statutes in each State involves excessive entanglement between government and religion" (at 614). Having so concluded, this Court found it unnecessary to decide whether legislative precautions under each Act restricted the primary effect of the programs to the point where they did not offend the Religion Clauses.

Entanglement was found in *Lemon* in part, but only in part, because of the close government supervision of church schools required by the Pennsylvania and Rhode Island statutes. Equally important were other considerations which apply with equal force here. Thus, this Court referred not only to the administrative entanglement aspect but also to entanglement of religion and government in the political process. It said (at 622-3):

> * * * In a community where such a large number of pupils are served by church-related schools, it can be assumed that state assistance will entail considerable political activity. Partisans of parochial schools, understandably concerned with rising costs and sincerely dedicated to both the religious and secular educational missions of their schools, will inevitably champion this cause and promote political action to achieve their goals. Those who oppose state aid, whether for con-

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stitutional, religious, or fiscal reasons, will inevitably respond and employ all of the usual political campaign techniques to prevail. Candidates will be forced to declare and voters to choose. It would be unrealistic to ignore the fact that many people confronted with issues of this kind will find their votes aligned with their faith.

Ordinarily political debate and division, however vigorous or even partisan, are normal and healthy manifestations of our democratic system of government, but political division along religious lines was one of the principal evils against which the First Amendment was intended to protect. Freund, Comment, Public Aid to Parochial Schools, 82 Harv. L. Rev. 1680, 1692 (1969). The potential divisiveness of such conflict is a threat to the normal political process. Walz v. Tax Commission, *supra,* at 695, 90 S. Ct., at 1424 (separate opinion of Harlan, J.). See also Board of Education v. Allen, 392 U.S., at 249, 88 S. Ct., at 1929 (Harlan, J., concurring); Abington School District v. Schempp, 374 U.S. 203, 307, 83 S. Ct. 1560, 1616, 10 L. Ed. 2d 844 (1963) (Goldberg, J., concurring). To have States or communities divide on the issues presented by state aid to parochial schools would tend to confuse and obscure other issues of great urgency. * * *

The present Pennsylvania plan for aiding sectarian schools is just as productive of "political division along religious lines" as the one condemned in *Lemon.* Whatever form government aid to church schools may take—salary supplement plans as in *DiCenso,* tuition reimbursement as in this case, or tax credits as in other cases now before this Court—the level and even the existence of the state support will be a public issue at every election and during each legislative session. This can be prevented only if it is made

clear that the Constitution bars all forms of government aid to religiously affiliated schools.

Certainly, there is no reason to believe that enactment of any one bill will eliminate the issue from the public sphere. There will always be pressure to raise or to lower the amount of the reimbursement allowance, the tax credit or whatever form of allotment may be devised.

This has already been illustrated in Pennsylvania. In 1971, the state legislature provided that 23% of the revenues collected under the Pennsylvania Cigarette Tax Act should be paid into the State Treasury to the credit of the Parent Reimbursement Fund beginning in July 1971. The 1972 legislature amended the Act to provide that 10% of such revenues collected be paid into the Parent Reimbursement Fund. However, the original bill introduced that year (H.B. 2150) proposed that 5% of the revenues collected be credited to the the Reimbursement Fund. Obviously, neither 23%, 10% nor 5% is a fixed, immutable figure. It is conceivable, even likely, that upward revisions will be necessitated by inflationary pressures. But even without inflation advocates of state aid are bound to seek constant raising of the level of aid until they reach their candidly stated goal of "parity," under which the state would spend the same amount for secular education of each child in nonpublic schools as it spends on each public school child. Surely, as this Court pointed out in *Lemon-DiCenso,* these are the very evils the First Amendment sought to avoid.

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POINT III

Insofar as the Act authorizes the payment of public funds to private schools that are racially segregated, it violates the Equal Protection Clause of the Fourteenth Amendment.

A. The private schools which are beneficiaries of funds under the Act are racially segregated.

The allegations contained in the complaint, which must be taken as true in this phase of the case, include the following in paragraph 11:

> The Act on its face and as construed and applied by the defendant authorizes and directs payments for the tuition of students in educational institutions which by purpose or effect segregate students by race, thereby perpetuating and promoting the segregation of races and two separate school systems in Pennsylvania—a public school system predominantly black, poor and inferior and a private subsidized school system predominantly white, affluent and superior.

There is ample reason for believing that these allegations can be substantiated on trial. Available evidence shows that the non-church-related schools in Pennsylvania and the non-Catholic church-related schools were all virtually 100-per-cent white. The Catholic parochial school system, while it contains a substantial proportion of black students, is nevertheless largely segregated.

The periodical, *Commonweal,* in its October 7, 1966 issue, quoted the following statement of Richardson Dil-

worth, former Mayor and former School Board President in Philadelphia (p. 13):

> Today, in our city, 40 per cent of the total school population is in parochial and private schools. The result is that while only 30 per cent of our city's population is non-white, 57 per cent of our public school pupils are non-white. And, today, there are more white children in parochial and private schools than there are in our city's entire public school system.

The following facts are set forth in the 1967 Report of the United States Commission on Civil Rights entitled "Racial Isolation in the Public Schools" (p. 31):

> Private and parochial school enrollment, which is overwhelmingly white, also is a significant factor in the increasing separation of white and Negro school children.
>
> * * *
>
> In 1960, of the more than four million pupils enrolled in non-public elementary schools in the United States, only 140,529 were non-white. 44,308 non-whites were attending non-public secondary schools which had a total enrollment of more than one million.

The Report says further (pp. 38-39):

> Private and parochial school enrollment also is an important factor in the increasing concentration of Negroes in city school systems. Non-public school enrollment constitutes a major segment of the nation's elementary and secondary school population. Nationally, about one-sixth of the total 1960 school enrollment (Grades 1-12) was in private schools. In metropolitan areas the proportion is slightly higher, and divided unevenly between city and suburb. Nearly one-third more elementary school students in the cities at-

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> tend nonpublic schools than in the suburbs. Almost all of them are white. In the larger metropolitan areas the trend is even more pronounced. * * * [A] much higher proportion of white city students than white suburban students attend private and parochial elementary schools. Nonwhites in these metropolitan areas, whether in cities or suburbs, attend public schools almost exclusively.

A table, following this statement, shows the following proportion of total elementary students, by race, in public and nonpublic schools, for 15 metropolitan areas in 1960 (p. 39):

Central Cities	*White*	*Nonwhite*
Public Schools	61%	94%
Nonpublic Schools	39%	6%
Suburbs	*White*	*Nonwhite*
Public Schools	75%	97%
Nonpublic Schools	25%	3%

Since the issuance of the Civil Rights Commission Report more recent figures for Philadelphia have become available.

In the city of Philadelphia proper in January 1971, 63.6% of the total enrollment in public schools was nonwhite (including Spanish-speaking). This contrasts sharply with the situation in the Catholic parochial schools in the Archdiocese of Philadelphia which includes four adjacent counties. There, in September 1971, only 8.4% of the elementary students and 5.1% of the secondary students were nonwhite (including Spanish-speaking).[2]

2. Excluded from these figures is the relatively small number of non-Catholics attending Catholic parochial schools, because their racial breakdown is not given. (Non-Catholic pupils comprised 2.1% and .3% respectively, of the pupils attending Catholic elementary and secondary schools).

These figures are derived from "Enrollment: Negro and Spanish Speaking in the Philadelphia Public Schools—1970-71" by the Office of Research and Evaluation of the School District of Philadelphia and from "The Report of the Archdiocesan Advisory Committee on the Financial Crisis of Catholic Schools in Philadelphia and Surrounding Counties" by John T. Gurash, Chairman of the Committee, 1972.

The foregoing figures illustrate, as to both Pennsylvania and the United States generally, that enrollment of black children in private schools is very low and far below the ratio of blacks in the total population.

The result, of course, is that the percentage of white children in public schools is considerably lower than it should be on the basis of the white-black ratio in the population. Many public schools, even in racially mixed neighborhoods, are becoming Negro schools because of the movement of white children to private schools. This leads, in effect, to a dual system of schools—the public schools attended predominantly by blacks and the private schools, mainly parochial schools, attended predominantly by whites.

B. The use of public funds to maintain and perpetuate racial segregation is prohibited.

In *Brown* v. *Board of Education of Topeka*, 347 U.S. 483 (1954), this Court declared racial segregation in public education to be a denial of the equal protection guaranteed by the Fourteenth Amendment. It held unconstitutional the dual system under which whites and Negroes were required to attend different schools in a number of Southern states.

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A year later, in its implementing order, this Court required public school boards to abolish such dual school systems and to effectuate the transition to racially non-discriminatory school systems. 349 U.S. 294, at 301 (1955). In subsequent decisions, this Court reaffirmed its decisions in *Brown I* and *Brown II* and made it clear that the time has run out for efforts to delay school integration. *Cooper* v. *Aaron,* 358 U.S. 1 (1958); *Griffin* v. *County School Board of Prince Edward County,* 377 U.S. 218 (1964); *Green* v. *County School Board of New Kent County,* 391 U.S. 430 (1968); *Raney* v. *Board of Education of the Gould School District,* 391 U.S. 443 (1968); *Monroe* v. *Board of Commissioners of the City of Jackson, Tenn.,* 391 U.S. 450 (1968); *Alexander* v. *Holmes County Bd. of Ed.,* 396 U.S. 19 (1969); *Swann* v. *Charlotte Mecklenburg Bd. of Ed.,* 402 U.S. 1 (1971).

In *Brown I,* this Court based its conclusion that the dual system is unconstitutional on the discrimination which is inherent in a separation of pupils by race. The Court said (374 U.S. at 494):

> To separate them [Negro pupils] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely to be undone.

This Court has not yet decided the question whether a school system which does not require whites and blacks to attend different schools but where, as a result of a segregated residential pattern, white and black pupils to a large extent attend different schools, amounts to a dual

system which is in conflict with the Equal Protection Clause of the Fourteenth Amendment as interpreted in *Brown I and II*. This problem of so-called "de facto" segregation is one of the issues in *Keyes* v. *School District No. 1, Denver, Colorado,* 445 F.2d 990 (1971), which is now before this Court. Cert. granted, 92 S.Ct. 707 (1972).

However, plaintiffs in this action do not attack the pattern of segregation which results from the operation of private schools, *per se*. The thrust of their complaint is directed against the state which, by providing financial aid to parents sending their children to private schools and thus helping to maintain and perpetuate the pattern of segregation resulting from the existence of these schools, engages in discriminatory state action.

There is no question that the authorized payment of public monies is state action. *Cooper* v. *Aaron,* 358 U.S. 1, 19 (1958); *Poindexter* v. *Louisiana Financial Assistance Commission,* 258 F. Supp. 158, 162 (E.D. La. 1966); *Poindexter* v. *Louisiana Financial Assistance Commission,* 275 F. Supp. 833, 854 (E.D. La. 1967), *aff'd,* 389 U.S. 571 (1968). *Green* v. *Connally,* 330 F. Supp. 1150, 1164 (1971). In fact, it is hard to imagine any action which can be attributed to the state more closely and intimately than the authorized payment of state funds. The crucial question then is whether payment of state funds to reimburse parents for payment of tuition to private, including parochial, schools under the Act is discriminatory state action.

There is ample authority for the proposition that public aid to private schools or to pupils attending private schools

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which serves to support racially segregated education constitutes denial of equal protection in violation of the Fourteenth Amendment. This Court said in *Cooper v. Aaron, supra* (358 U.S. at 19):

> State support of segregated schools through any arrangement, management, funds or property cannot be squared with the [Fourteenth] Amendment's command that no State shall deny to any person within its jurisdiction the equal protection of the laws.

Repeatedly, Federal courts have struck down on the same ground state plans to provide for tuition grants for students attending private schools. *Bush* v. *Orleans Parish School Board,* 187 F. Supp. 42, 188 F. Supp. 916 (E.D. La. 1960), *aff'd,* 365 U.S. 569 (1961); *Hall* v. *St. Helena Parish School Board,* 197 F. Supp. 649 (E.D. La. 1961), *aff'd,* 368 U.S. 515 (1962); *Poindexter II, supra,* 275 F. Supp. 833; *Coffey* v. *State Education Finance Commission,* 296 F. Supp. 1389 (S.D. Miss. 1969); *Gilmore* v. *City of Montgomery,* 337 F. Supp. 22 (1972).

The principle that the use of public funds to support activities by private persons or groups which involve racial discrimination denies equal protection is applied also in fields other than education. See, *e.g., Simkins* v. *Moses H. Cone Memorial Hospital,* 323 F.2d 951 (4th Sir. 1963);[3] *Eth-*

3. In *Simkins,* Negro physicians complained that government funds were given to two hospitals which discriminated against them because of their race. They did not seek an injunction against public support of discrimination or segregation, but an injunction against the discriminatory conduct of the recipients of the funds. In the present case, in contrast, plaintiffs do not seek an injunction against discriminatory conduct of the schools, but an injunction against state support of discrimination. Either remedy is suitable to eliminate a violation of the Fourteenth Amendment prohibition of using public funds to maintain racial discrimination and segregation.

ridge v. *Rhodes*, 268 F. Supp. 83 (S.D. Ohio 1967). And see Executive Order No. 11246, September 24, 1965, 30 F.R. 12319, on equal employment opportunity, and Executive Order No. 11063, November 24, 1962, 27 F.R. 11527, on equal opportunity in housing. See also Section 601 of the Civil Rights Act of 1964 prohibiting racial discrimination under any program or activity receiving Federal financial assistance. 42 U.S.C. 2000d.

In some of the cases cited above, courts found that grants of public funds were made for the purpose of evading desegregation of public schools and perpetuating racial segregation. But such a discriminatory purpose is not a prerequisite for holding that a grant aiding an educational institution directly or indirectly is in violation of the Equal Protection Clause. All that is required is that the grant has the *effect* of maintaining, promoting or perpetuating segregation.

In *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715, 725 (1961), this Court said:

> * * * no State may effectively abdicate its responsibilities by either ignoring them or by merely failing to discharge them whatever the motive may be. It is of no consolation to an individual denied the protection of the laws that it was done in good faith. Certainly the conclusions drawn in similar cases by the various Courts of Appeals do not depend on such a distinction.

And see cases there cited (*Id.* at 725, n.2).

Applying this principle, it was held in *Poindexter II*, *supra*, that the fact that grants to private schools had the effect of "assisting whites to flee to private schools," 275

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F. Supp. at 856, provided an independent ground for the holding that the state law authorizing such grants was unconstitutional. After stating that the purpose of the act involved in that case was discriminatory, the court continued: "We hold *also* that Act 147 of 1962 is unconstitutional in its actual effect." *Id.* at 857 (emphasis added).[4]

Hence, all that appellees in the present case have to allege—as they have done—and to prove—if and when the case goes to trial—is that aid given to nonpublic schools, including parochial schools, under the Act promotes racial discrimination and segregation in the affected schools. It can be said, in addition, that the effect of the Act is to "encourage" parents of white children to leave public schools and thus to aggravate and perpetuate patterns of racial segregation in education. See *Reitman* v. *Mulkey*, 387 U.S. 369 (1967).

Returning to *Burton, supra,* the applicability of the "state action" concept to this case is not affected by the language in that opinion stating that "private conduct abridging individual rights does no violence to the Equal Protection Clause unless to some significant extent the State in any of its manifestations has been found to have become involved in it." 365 U.S. at 722. The "significant involvement" doctrine of *Burton* would apply in the present case only if appellees sought a judgment restraining the

4. Also relevant in this connection is *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971). That case arose under Title VII of the Civil Rights Act of 1964 which prohibits discriminatory employment practices. 42 U.S.C. 2000e *et seq.* In discussing this prohibition this Court made it clear that whether a given practice is discriminatory does not depend on motivation by the employer but on the consequences of the practice in question.

affected schools from discriminating or segregating on a racial basis. Only then would the question arise as to whether the state involvement in the school operation as a result of its providing funds is so significant that such operation becomes state action. But the thrust of the complaint in the present case is directed at the state because of the aid it gives to the parents of children attending those schools; as mentioned before, there can be no question that such aid constitutes state action regardless of whether the amounts given are small or large. (See *Poindexter II, supra,* 275 F. Supp. at 854, where it was said that "the payment of public funds in any amount through a state commission under authority of a state law is undeniably state action.")

POINT IV

Appellee Lemon has standing to raise the question of Equal Protection.

In order to claim invalidity of the Pennsylvania Act under the Equal Protection Clause of the Fourteenth Amendment, appellees or at least one of them must have standing to raise this issue. *Baker* v. *Carr,* 369 U.S. 186, 204 (1962); *Barrows* v. *Jackson,* 346 U.S. 249, 255 (1953). Alton J. Lemon, one of the appellees, we submit, has such standing.

Lemon is the father of a black child attending a public school in Pennsylvania. It is alleged in the complaint that the Act on its face and as construed and applied by defendants perpetuates and promotes the segregation of races in violation of the Fourteenth Amendment.

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Thus, appellee Lemon in this action vindicates the constitutional right of his child not to be subjected to segregated education. Hence, he has standing under the basic rule that a person may vindicate his own constitutional rights. *Barrows* v. *Jackson, supra.* See also *Poindexter I, supra,* and *Griffin* v. *State Board of Education,* 239 F. Supp. 560, 562 (E.D. Va. 1965); see also Note, Federal Tax Benefits to Segregated Private Schools, 68 Colum. L. Rev. 922, 952-54 (1968). Lemon's position in this matter is no different from that of plaintiffs in *Alexander* v. *Holmes County Board of Ed., supra,* and the other cases on desegregation and integration decided by this Court. In each of these cases, plaintiff Negroes claimed that they and their children were directly affected by discrimination and segregation in public schools. Like the plaintiffs in those cases, Lemon and his child have "a personal stake in the outcome of the controversy." *Baker* v. *Carr, supra,* cited in *Flast* v. *Cohen,* 392 U.S. 83, 99 (1968).

Therefore there is no need in the present case to carve out a special exception to the general rule as was done in *Barrows* v. *Jackson, supra,* where a white person was granted standing to complain that the enforcement of a restrictive covenant against a Negro deprived the latter of the equal protection of the laws. Instead, the general rule applies, under which a person may claim standing in this Court to vindicate his constitutional rights.

If Lemon had no standing to bring the present action, there would be no possible way of contesting the grants made under the Act on the ground that they constitute a violation of the equal protection of Negro children in the public schools. Obviously, neither the schools which re-

ceived state aid nor the children attending such schools can be expected to contest the grants.

Maintenance of constitutional government requires that there be some way of testing the constitutionality of laws and administrative acts. Otherwise the very foundation of our Constitution would be subverted. *Marbury* v. *Madison*, 1 Cranch 137 (1803).

The rules governing standing should be given a liberal interpretation to facilitate the review of laws and administrative acts as to their constitutionality. It is for these reasons that the *amici* believe that appellee Lemon should be held to have standing to raise the constitutional question based on the Equal Protection Clause.

Conclusion

It is respectfully submitted that the decision below should be affirmed.

Respectfully submitted,

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March, 1973.

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Supreme Court, U. S.
FILED
MAR 29 1973
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1972.

72-459 and 72-620. 459, 620.

GRACE SLOAN, as State Treasurer of the Commonwealth of Pennsylvania

and

JOSE DIAZ and ENILDA DIAZ, His Wife, WILLIAM ZIMMERSPITZ and NANCY ZIMMERSPITZ, His Wife, F. CARL KRETZMAN and KATHERYN L. KRETZMAN, His Wife, ARTHUR HARVEY and MURIEL HARVEY, His Wife, DANIEL F. X. POWELL and ANNA T. POWELL, His Wife, SETH W. WATSON, JR. and ANNE P. WATSON, His Wife, and HENRY E. CROUTER,

Appellants,

v.

ALTON J. LEMON, NEAL F. BRACKEN and BENJAMIN S. LOWENSTEIN,

Appellees.

Appeal From the United States District Court for the Eastern District of Pennsylvania.

BRIEF FOR APPELLEES.

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OPINION.

On July 21, 1972, the three-judge District Court granted Appellees' (plaintiffs below) Motion for Summary Judgment based on an Opinion of April 6, 1972, which denied Appellants' (defendants below) Motions to Dismiss. That Opinion is reported at 346 F. Supp. 1356 (E. D. Pa. 1972) and is in the Appendix beginning at page 37a.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

Constitution of the United States, Amendment I, as applicable to the States by the Fourteenth Amendment:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . ."

Constitution of the United States, Amendment XIV:

> "[N]or shall any state . . . deny to any person within its jurisdiction the equal protection of the laws."

Parent Reimbursement Act for Nonpublic Education Act 92 of the Laws of Pennsylvania, 1971, P. L. —, Pa. Stat. Ann., Tit. 24, § 5701, et seq. (Supp. 1972) (hereinafter, the Act). The Act is set forth in the Appendix, commencing at page 56a.

QUESTIONS PRESENTED.

1. Does the Pennsylvania Parent Reimbursement Act for Nonpublic Education (Act 92 of the Pennsylvania General Assembly, August 27, 1971), which at the end of a school year would reimburse parents of nonpublic school children all or a portion of the tuition paid at a nonpublic school, violate the Establishment Clause of the First Amendment to the United States Constitution either because it subsidizes religious education or because it has a primary effect which advances religion or because it fosters excessive political entanglement?

2. Does the Act violate the Free Exercise Clause of the First Amendment to the United States Constitution?

3. Did appellees (plaintiffs below) have standing to assert that the Act additionally violates the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States in that it perpetuated and promoted the segregation of the races?

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STATEMENT OF THE CASE.

The Commonwealth of Pennsylvania enacted the Parent Reimbursement Act for Nonpublic Education on August 27, 1971 (App. 56a). Under the Act parents of nonpublic students are reimbursed $75 for elementary school tuition and $150 for secondary school tuition.

On September 13, 1971, Appellees filed their Complaint alleging that the Act violated the Establishment, Free Exercise and Equal Protection Clauses of the Constitution. Thereafter, parents of children attending sectarian and nonsectarian nonpublic schools in the State intervened as parties defendant.

All defendants moved to dismiss the Complaint for failure to state a claim for relief. On April 6, 1972, the three-judge District Court denied those motions (App. 56a). On April 28, 1972, the Court granted motions of the defendants to dismiss those counts of the Complaint relating to the Free Exercise and Equal Protection Clauses (App. 64a).

After all defendants filed answers, plaintiffs moved for summary judgment. That motion was granted on July 21, 1972 and the Court, relying on its previously filed Opinion of April 6, 1972, permanently enjoined the State Treasurer from paying any funds to parents of children attending nonpublic schools.

SUMMARY OF ARGUMENT.

Tuition reimbursement to parents of parochial school children at the end of the school year, constitutes impermissible government aid of parochial education.

Whether tuition moneys are paid to parents or to schools is not significant, for in either case the result is that religion has been advanced. Government may no more help parents advance religion than it may help churches do so. Conversely, where government aid does not advance religion, and avoids entanglement, it may be paid to religious institutions directly. *Tilton v. Richardson*, 403 U. S. 672 (1971).

Whether reimbursements are made at the beginning or the end of the school year is also not significant, and the argument that the recipients are free to spend the reimbursement in any way they choose will not withstand judicial scrutiny. Act 92 speaks to parents at the *beginning* of the year, and tells them that *if*—and only if—they send their children to nonpublic schools, they will receive tax moneys at the end of the year. The statutory promise thus encourages parents to send their children to and pay tuition to parochial schools, and thereby advances religion.

Act 92 fosters political entanglement and divisiveness, precisely as did the Pennsylvania statute invalidated by this Court in *Lemon v. Kurtzman*, 403 U. S. 602 (1971). As noted by the lower Court in *Wolman v. Essex*, 342 F. Supp. 399 (S. D. Ohio 1972), this is particularly the case with statutes whose direct beneficiaries are a particular portion of the population comprised in the main of persons of a single religion. For the foregoing reasons, the lower Court was correct in holding that Act 92 violates the Establishment Clause of the First Amendment.

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The lower Court dismissed the Counts in the appellees' Complaint which averred that Act 92 violated the Free Exercise Clause of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment. The use of tax funds for the advancement of religion violated the religious consciences of appellees, and the freedom from being taxed for religious purposes is fundamental to the whole concept of religious freedom. Furthermore, Appellee Lemon, a parent of a black child in a public school, had standing and should have been permitted to prove that Act 92 fosters racially segregated schools.

ARGUMENT.

I. PARENT REIMBURSEMENT ACT FOR NONPUBLIC EDUCATION SUBSIDIZES SECTARIAN INSTRUCTION, HAS A PRIMARY EFFECT WHICH ADVANCES RELIGION, AND FOSTERS EXCESSIVE POLITICAL ENTANGLEMENT, AND THEREFORE VIOLATES THE ESTABLISHMENT CLAUSE.

Introduction.

If there is any doctrine in constitutional law that can be said to be definitively settled, it is that an unrestricted grant of governmental funds to a school which has as a dominant or substantial purpose sectarian instruction or religious worship violates the Establishment Clause of the First Amendment (as well as the constitutional, statutory or decisional law of every State in the Union). We know of no court, judge or constitutional authority who has expressed a contrary view. Hence, if the Parent Reimbursement Act for Nonpublic Education ("Act 92") provided simply that at the end of the school year the State would pay *to each such school* the sum of $150 for each high school pupil and $75 for each elementary pupil, the Act would be clearly unconstitutional on its face.

The appellants in the present case do not contend the contrary. Their sole attempted justification of the constitutionality of the Act rests upon the provision that the sum be paid not directly to the school but to the parent of the pupil on production of a receipted tuition bill at the end of the school year. The question to be decided by this Court then is whether the constitutional prohibition against governmental financing of religious instruction and practices can be avoided by the tuition reimbursement mecha-

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nism. If the answer to this question is yes, it would not merely elevate form over substance, but would make the Establishment Clause ineffective to prevent state support of religious education and worship in schools.

A. State Support of Parochial Education Generally, as Distinguished From the Support of Non-Educative Services and Secular Educational Services Provided by Such Schools, Has Always Been Regarded as Unconstitutional, From the Beginning of Our Nationhood to the Present Time, by Every Justice Who Has Addressed Himself to the Subject.

In the footnotes are cited the cases and historical background establishing that the use of tax monies for sectarian teaching was the very issue which gave rise almost two centuries ago to Virginia's Bill for the Establishment of Religious Freedom, the forerunner of the establishment clause;[1] that later, as a result of divisive struggles in many

---

1. In 1784, there was introduced into the Virginia Colonial Legislature, "A bill Establishing a Provision for Teachers of the Christian Religion." *Everson v. Board of Education*, 330 U. S. 1 (1947), Supplemental Appendix at p. 72 (Dissenting Opinion), ("Everson"). It sought to resume the payment of "tithes" which had been suspended in 1777. By its terms, the taxpayer could designate the sect whose Teacher or Minister his tax payment would support, and in the absence of such designation, the fund would be used "for the encouragement of seminaries of learning within the Counties whence such sums shall arise, and to no other use or purpose whatsoever." That Bill so outraged James Madison that he composed and circulated his famous "Memorial and Remonstrance Against Religious Assessments" in which he said:

> Who does not see . . . that the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever? Appendix, *Id.* at 65-6.

The Memorial and Remonstrance won the day and the Bill was defeated in 1785. Because "tithes had been the life blood of establish-

states throughout the 19th century, the prohibition of State support for religious instruction "became the guiding principle, in law and feeling, of the American people";[2] and that still later, and repeatedly in the last twenty-five years, this Court and various state Supreme Courts, stated and restated that the First and Fourteenth Amendments bar

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1. (Cont'd.)

ment," this date, and the earlier date when such payments were first suspended (1777), are variously described as the date of disestablishment of the Anglican Church in Virginia. There was then enacted Thomas Jefferson's Bill for Establishing Religious Freedom, the forerunner to the First Amendment. The Preamble to that Bill stated "that to compel a man to furnish contribution of money for the propagation of opinions which he disbelieves is sinful and tyrannical . . ." *Everson, dissent supra* at pp. 33-41 n. 33.

2. "As the momentum for popular education *increased and in turn evoked strong claims for State support of religious education*, contests not unlike that . . . in Virginia . . . appeared in various forms in other States. * * * In New York, the rise of the common schools led . . . to the barring of tax funds to church schools, *and later to any school in which sectarian doctrine was taught*. * * * The upshot of these controversies, often long and fierce, is fairly summarized by saying that long before the Fourteenth Amendment subjected the States to new limitations, the prohibition of furtherance by the State of religious instruction became the guiding principle, in law and feeling, of the American people. * * *"

"Separation in the field of education, then, was not imposed upon unwilling States by force of superior law. In this respect the Fourteenth Amendment merely reflected a principle then dominant in our national life. To the extent that the Constitution thus made it binding upon the States, *the basis of the restriction is the whole experience of our people*. * * *" *McCollum v. Board of Education*, 333 U. S. 203, 214, 215 (1948) (concurring opinion of Mr. Justice Frankfurter) (emphasis supplied).

In the 1868 edition of *Cooley, Constitutional Limitations*, he states (at p. 469):

"Those things which are not lawful under any of American constitutions may be stated thus:—

* * *

"2. Compulsory support, by taxation or otherwise, of religious instruction. Not only is no one denomination to be favored at the expense of the rest, but all support of religious instruction must be entirely voluntary."

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the use of tax funds for the support of any institution which teaches sectarian doctrine.[3]

3.

1947—"No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion." *Everson, majority, supra,* note 1 at p. 16.

"New Jersey cannot consistently with the 'establishment of religion' clause of the First Amendment contribute tax-raised funds to the support of an institution which teaches the tenets and faith of any church." *Id.*

"It [the purpose of the First Amendment] was to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion. In proof the Amendment's wording and history unite with this Court's consistent utterances whenever attention has been fixed directly upon the question." *Everson, dissent, supra,* note 1 at pp. 31-32.

". . . the Amendment forbids any appropriation large or small, from public funds to aid or support any and all religious exercises." *Id.* at 41.

1952—"Government may not finance religious groups . . ." *Zorach v. Clauson,* 343 U. S. 306, 314 (1952).

1955—A tuition reimbursement law was held in 1955 by a unanimous Virginia Supreme Court to violate the First Amendment, in these words:

"The payment of such items to sectarian schools as directed or authorized by the terms of Item 210 is unconstitutional because, (1) it utilizes public funds to support religious institutions contrary to the principles laid down in *Everson v. Board of Education, supra,* 330 U. S., at page 16, 67 S. Ct., at page 511; (2) It 'affords sectarian groups an invaluable aid in that it helps to provide pupils for their religious classes through use of the state's compulsory public school machinery,' condemned in *McCollum v. Board of Education,* 333 U. S. 203, 212 S. Ct. 461, 466, 92 L. ed. 649; (3) It compels taxpayers to contribute money for the propagation of religious opinions which they may not believe. See *Protestant Episcopal Education Society v. Churchman's Representatives,* 80 Va. 718, 885; *Jones v. Commonwealth,* 185 Va. 335, 344, 38 S. E. (2d) 444, 448." *Almond v. Day,* 197 Va. 419, 430 (1955).

Until recently, general subsidization of parochial schools by way of tuition or teachers' salary payments or across-the board grants of any kind was very much the exception. The landmark cases in the main have concerned statutes granting only limited aid for certain non-educational, or secular educational, services. Thus, a bare majority of the Supreme Court held in *Everson*[4] that bus transportation, while on the "verge" of permissibility,[5] is a service which a state may provide to all its children as a general health or safety measure, much like free milk, lunches, nursing services, or dental and eye examinations. While it is true that such state aid may cause parochial schools to save money, that has never been the test of constitutionality.[6]

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3. (Cont'd.)

1960—A unanimous Vermont Supreme Court came to the same conclusion where the State paid the tuition to the schools. *Swart v. South Burlington Town School District,* 122 Vt. 177, 167 A. 2d 514 (1960).

1963—*"The most effective way to establish any institution is to finance it; and this truth is reflected in the appeals by church groups for public funds to finance their religious schools."* (emphasis in original) *School District of Abington v. Schempp,* 374 U. S. 203, 229 (1963) (concurring opinion of Mr. Justice Douglas).

1970—"General subsidies of religious activities would, of course, constitute impermissible state involvement with religion." *Walz v. Tax Commission,* 397 U. S. 664, 690 (1970) (concurring opinion of Mr. Justice Brennan).

1971—"The Rhode Island Legislature has not and could not, provide state aid on the basis of a mere assumption that secular teachers under religious discipline can avoid conflicts. The State must be certain, given the Religion Clauses, that subsidized teachers do not inculcate religion . . ." *Lemon v. Kurtzman,* 403 U. S. 602, 619 (1971) ("Lemon").

4. See note 1, *supra.*

5. *Id.* at 16.

6. *Id.* at 18; *Tilton v. Richardson,* 403 U. S. 672, 679 (1971).

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Later legislative efforts approached the problem differently, and attempted to separate out the secular from the religious educational services in order to provide tax funds for the one but not the other. First, on a "meager record" containing no evidence on the question whether secular textbooks "are used by the parochial school to teach religion," and with three justices dissenting, the Court held that a state may lend secular textbooks to parochial school children. *Board of Education v. Allen* ("Allen").[7]

Next, the Supreme Court dealt with Pennsylvania's attempt to "purchase" secular educational services from private schools and with Rhode Island's effort to supplement salaries of those private school teachers who do not teach religion. With only one justice dissenting, both laws were invalidated.[8] The issue in both cases appeared to be whether the secular and the sectarian in a parochial school are separable, such that the one but not the other could be aided with public funds. But that issue was never joined, for the Court concluded 1) that such aid would be unconstitutional unless the State were *certain* that the subsidized teachers do not inculcate religion, and 2) that the kind of pervasive restrictions and supervision necessary to ensure such certainty would themselves bring about an unconstitutional entanglement between church and state. Thus:

> The Rhode Island Legislature has not, and could not, provide state aid on the basis of a mere assumption that secular teachers under religious discipline can avoid conflict. The State must be certain, given the Religion Clauses, that subsidized teachers do not inculcate religion. * * * These prophylactic contacts will involve excessive and enduring entanglement between state and church.[9]

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7. 392 U. S. 236, 248 (1968).

8. *Lemon, supra* note 3.

9. *Id.* at 619.

Now we have come full circle. Outright grants being clearly unconstitutional, legislatures enacted a number of laws providing fringe benefits such as health services, milk and bus transportation for parochial school children. They then attempted to provide aid for the secular part of the school's educational program but, except for secular textbooks, it was held that our constitution would not permit it. Now, in the instant case, we are confronted with the kind of law which, if constitutional, would have made unnecessary all of the previous legislative efforts. For this law would have the state reimburse all or part of parochial school tuitions. Tuitions are the "very life blood" of a parochial school [10] just as "tithes had been the lifeblood of establishment" of the Anglican Church in Virginia.[11] The one is as profoundly at variance with the whole meaning of the First Amendment as the other. Pennsylvania has done *exactly* what the Court, in the quotation above, said Rhode Island could not do. It has provided aid either on the "mere assumption" that teachers in the aided schools do not inculcate religion, or, worse yet, totally without regard to whether they do or not.

B. Act 92 Constitutes State Support of Parochial Education, and Its Primary Effect Advances Religion.

1. Tuition Payments Directly to Schools and Tuition Payments to Parents Are Constitutionally Identical.

As has been noted, independent of the First Amendment every State in the Union forbids governmental support of religious education. Efforts to avoid this prohibition by means of tuition payments—to institutions and by way of reimbursements to parents—have had a long and uniformly

10. *Almond v. Day,* 197 Va. 419, 427 (1955).

11. *Everson, dissent, supra* note 1 at p. 41.

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unsuccessful history. As stated in 1938 by the New York Court of Appeals in *Judd v. Board of Education:* [12]

> The courts of this country have been unanimous in prohibiting a use of public funds to pay directly or indirectly, tuition fees of pupils in private or sectarian schools.

Typical of the state court decisions is that of the Kentucky Court of Appeals in *Williams v. Board of Trustees,* [13] which held that an arrangement between a public board of education and a sectarian college under which the college was paid tuition fees out of common school funds was a flagrant violation of a constitutional provision that no portion of any funds raised by taxation for education may be used in aid of any church, sectarian or denominational schools.

Nor have there been any changes in state court decision since the New York court spoke in *Judd v. Board of Education.* In *Opinion of the Justices,* [14] the Massachusetts Supreme Judicial Court held in 1970 that a measure providing for payment in the sum of $100 to each child attending an accredited private school in the form of a voucher endorsed by the payee to the school, and providing further that "No allotment shall be used to subsidize courses of religious doctrine or worship," violated a provision in the State constitution against the use of public funds to aid private schools.

In 1971, the South Carolina Supreme Court invalidated a 1970 statute providing for tuition grants to students at nonpublic colleges in the State, holding that the statute violated the State constitutional prohibition against use of

12. 278 N. Y. 200, 215 (1968).

13. 173 Ky. 708 (1917).

14. 259 N. E. 2d 564 (Mass., 1970).

public funds for the support of institutions controlled by religious denominations.[15] In that case the Court said:

> We reject the argument that the tuition grants provided under the Act do not constitute aid to the participating schools. Students must pay tuition fees to attend institutions of higher learning and the institutions depend upon the payment of such fees to aid in financing their operations. While it is true that the tuition grant aids the student, it is also of material aid to the institution to which it is paid. The fact that only a portion of the tuition costs are covered by the grants from the State affects the matter only in degree. If State funds can be used to provide a portion of the tuition costs for attendance at religious schools, all could just as legally be paid, resulting in the support of such institutions entirely with State funds.

These cases were decided under state constitutional provisions, but these provisions merely state specifically what the United States Supreme Court has consistently held in every Establishment case that has come to it from *Everson* through *Lemon* and *Tilton v. Richardson,* namely, that governmental funds may not be used to finance religious education or worship. In any event, the same result has been reached in three recent federal court decisions (*Wolman v. Essex,* 342 F. Supp. 399 (S. D. Ohio 1972) *aff'd* 93 S. Ct. 61; *Committee for Public Education and Religious Liberty v. Nyquist,* — F. Supp. — (S. D. N. Y. 1972), and the decision in the instant case). All three decisions were by three-judge courts and all were unanimous. Finally, in the two State court cases which have considered the question under the Establishment Clause of the First Amend-

15. *Hartness v. Paterson,* 179 S. C. 2d 997 (1971).

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ment of the Federal Constitution (*Almond v. Day*,[16] and *Swart v. South Burlington School District*[17]), the courts ruled that statutes appropriating public funds to pay the tuition of pupils attending sectarian schools violated the Establishment Clause of the First Amendment.

Our research has failed to uncover a single decision of any court in the United States, Federal or state, upholding the constitutionality of a statute providing for payment—whether to school or parent—of tuition for attendance at religious schools. No such decision is cited in any of the briefs of appellants. The only permissible conclusion is that none exists.

C. The Fact That the Reimbursement Is Made at the End of the School Year Is of No Constitutional Significance.

Appellants argue that the reimbursement feature, and particularly the fact that the reimbursement is received at the end of the school year and may be spent in any way the recipient chooses, makes a difference. The lower courts in both the instant case and in *Wolman v. Essex* spoke to this precise issue,[18] and we will not repeat their conclusions in the body of this brief. We would add only the fact that the Act was passed *before* the school year started and what it told the parents was that *if* they enrolled their children in non-public schools they would receive tax funds at the end of the school year. The *statutory promise* thus encouraged parents to enroll their children in non-public schools. This was in conformity with the very purpose of that Act, which is said to be to aid parents so they will not "be forced by

16. See note 10, *supra*.

17. 122 Vt. 177, 167 A. 2d 514 (1961), *cert. den'd* 366 U. S. 925.

18. 342 F. Supp. 399, 415-417 (S. D. Ohio 1972); opinion of lower court in instant case at Appendix, 49a-55a.

economic circumstances to transfer" their children to public schools and create an "enormous added financial" burden on the public schools (Appendix, 57a). To the degree that purpose is achieved, the *effect* will be that children in private schools will not be transferred to public schools but will remain where they are. It is in this connection that the lower court so correctly observed:

> The state cannot maintain that the Act has the purpose of promoting education by supporting non-public schools and then deny that the effect of the Act is to aid these schools. (Appendix, 52a)

Had it been necessary to make a trial record, it would have been established that in most parochial schools tuitions were either *charged for the first time,* or were *increased by the statutory amounts* in the 1971-1972 school years, and parents were notified that these amounts would be reimbursed by the State at the end of the year. But no such proof is necessary, for even if parochial schools would have charged the same tuition with or without the new reimbursement law it would make no difference. The statutory scheme is such that the State, by promising reimbursement, has encouraged parents to pay tuition to parochial schools and thus has aided the schools. Furthermore, the State has no more power to help or to encourage *parents* to provide a religious education for their children than it has to help church schools to do so. Therein lies an additional weakness in appellants' argument. They focus on the question whether the reimbursement will or will not find its way into the religious school's treasury. Clearly that is not the critical factor. Tax funds may be and often are paid to religious institutions for a variety of purposes. See, e.g., *Tilton v. Richardson, supra.* Because it is substance and not form which must control, the lower Court

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held that there must be an examination into "the character of the aided activity rather than the manner in which aid is given." (Appendix, 51a).

When tax funds are provided for secular text books (*Allen*), the aided activity, absent evidence of misuse of the books, is secular education. When funds are used to pay secular teachers (*DiCenzo*) or to purchase math and foreign language courses (*Lemon*), the aided activity is secular education. When funds are used to build a building for secular use (*Tilton*), the aided activity is secular education. But when tax funds are used to encourage parents to continue to send their children to parochial schools, the "character of the aided activity," i.e., parochial education, is religious. Indeed the aided activity is at the very core of the whole purpose of religious organizations—i.e., the religious education of the young.

It can be argued that in *Everson* the activity which was aided by the bus transportation payments was, arguably, parochial education. But that case went to the "verge" of constitutionality, and the aid was incidental and quite finite. When a state undertakes to pay for bus transportation, there is a self-executing limit to the cost, and that cost will never be anything but a fraction of the total cost of running a school. But when a state undertakes to pay or repay a portion of *tuition*, there is no self-executing limit short of underwriting the entire budget of the school. The only limitation is that which state legislators choose to impose.

We respectfully suggest that if there were a constitutional difference between reimbursed and direct tuition payments, we would be engaged, in Mr. Justice Burger's apt phrase, in a "legalistic minuet" in which form and style is an end in itself. We must rather "examine the form of the relationship *for the light that it casts on the substance.*"[19]

19. *Lemon, supra,* note 3 at p. 614.

The substance of the matter is that whether the State gives $150 per child to the parochial school, or gives it to the parents to give to the school, or reimburses the parents after they have paid it to the school, the State is using tax-raised funds to subsidize parochial education.

D. Act 92 Fosters an Excessive Entanglement With Religion.

1. Administrative Entanglement.

If "administrative entanglement" is absent in Act 92, *it is absent only because the State has abandoned altogether any effort to provide its aid for exclusively secular purposes.* "The State must be certain, given the Religion Clauses, that subsidized teachers do not inculcate religion."[20] Pennsylvania, in order to avoid administrative entanglement, has stopped trying to be "certain," and has thereby again violated the First and Fourteenth Amendments.

2. Political Entanglement.

Furthermore, the Court in *Lemon* was equally concerned by political entanglements. The entanglement "presented by the divisive political potential of these state programs,"[21] inheres in the new Pennsylvania law exactly as it did in the old and demonstrates how close we really are to the very corruption of our political processes which brought about the First Amendment in the first place.

Many justices in many cases have shown the same acute concern as did Mr. Justice Burger over the divisive political potential of such legislation. In 1917, the Kentucky Supreme Court said that if legislatures were permitted to

20. *Id.* at 619.

21. *Id.* at 622.

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legislate in this sphere, "presently we would have the common schools here and there throughout the state operated in connection with that denominational school that happened to have the largest influence and membership in the particular community where the union was made."[22] Mr. Justice Jackson noted in *Everson*,[23] that the Religious Freedom clauses were intended "above all, to keep bitter religious controversy out of public life by denying to every denomination any advantage from getting control of the . . . public purse." Mr. Justice Harlan, in *Walz v. Tax Commission of City of New York* ("Walz")[24] commented that "[w]hat is at stake [in applying the First Amendment] as a matter of policy is preventing that kind of degree of government involvement in religious life that, as history teaches us, is apt to lead to strife and frequently strain a political system to the breaking point." And Mr. Justice Black stated in *Allen*,[25] that the establishment clause "was written on the assumption that state aid to . . . religious schools generates discord, disharmony, hatred, and strife among our people, and that any government that supplies such aid is to that extent a tyranny."

Mr. Justice Burger, in *Lemon*, noted that other forms of vigorous and partisan political debate are healthy manifestations of a democratic government. But somehow political debate over whether to finance religious activities had—in European history, in Colonial history and today—a shriller tone, engendering irrational fears and hate. Our founding fathers were so revolted by that *particular kind* of political division—along religious lines—that they "stripped" the legislature "of all power to tax, to support,

22. *Williams v. Board of Trustees*, 173 Ky. 708 (1917).

23. *Everson*, dissent, *supra* note 1 at p. 27.

24. 397 U. S. 664, 694 (1970).

25. 392 U. S. 236, 254 (1068).

or otherwise to assist any or all religions"[26] and they did so in the very first line of the Bill of Rights.

Judge Rubin, in *Wolman v. Essex, supra,* at 412, 413, noted that the potential for political entanglement is far greater where the class affected by the legislation is narrow and one religious group predominates within that class. He noted that in the cases where constitutionality has been upheld, "religiously affiliated institutions were among a broad class of beneficiaries deriving benefits of a general, broad-based, public policy." Perhaps this is just another way of saying that while laws which subsidize all religions are unconstitutional, laws which in their effect prefer some religions over others are even more abhorrent, because their potential for causing political divisiveness in a multi-religious society is so much greater.

The constitutionality of this law cannot be determined abstractly, as though Pennsylvania were starting afresh and as yet had no public or private schools. The law must be examined for its effect upon the present reality, which is that we have not only public schools but a wide network of private schools; that in the 1965-66 school year, over 95% of Pennsylvania's nonpublic elementary schools were church-related, and of these 88% were Catholic;[27] that a much higher percentage of Catholic school children attend parochial schools than do Jewish or Protestant children; and that a parochial school education is (and is regarded by its religious proponents to be) the most effective means available to the various denominations to maintain adherents to their particular faiths.[28]

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26. *Everson, majority, supra* note 1 at p. 11.

27. Report of Archdiocese, 1969; see also *Statistics of Nonpublic Elementary and Secondary Schools,* Office of Education, U. S. Department of Health, Education and Welfare, OE-20111.

28. See, e.g., Mr. Justice Jackson's dissent in *Everson, supra* note 1 at 22-24; Mr. Justice Douglas concurring in *School District of Abington v. Schempp,* 374 U. S. 203 (1963).

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Given those facts, the potential for political entanglement inhering in this law is obvious. It is no answer to argue that the funds are available to all equally, if they send their children to private schools. For all intents and purposes there *are* no such Protestant schools. At a time in the middle of the nineteenth century, when both knew that government funds would no longer be available to subsidize religious education, Protestant America chose to let their schools become public schools and Catholic America chose to begin the arduous process of building parochial schools. We wonder whether nineteenth century Protestantism would so readily have permitted their schools to evolve into our present public school systems, if they had been able to foretell the future: that after a century or more, when Protestant schools hardly existed, Catholic schools would qualify for state funding, thereby giving Catholicism an enormous advantage in the competition between creeds to win and maintain adherents.

No matter what else the religion clauses may have been intended to prevent, they certainly were intended to keep the heavy hand of government off the competition between sects. European history and our own Colonial history are replete with tragedies occurring when first this sect and then that gained control of the public purse. By virtue of the Religion clauses, once and for all religious ideas, like other ideas, were required to compete in the market place of ideas, entirely without the help of government, i.e., without public funds obtained by the compulsion of our taxing laws. Voluntarism was and is at the heart of the concept. Whether, in such a system, a particular sect would disappear or become the dominant or even exclusive religion of the American people was to be no concern of government. Each was free to try, but by persuasion only, and government could not help them persuade.

It is a fact that a far greater percentage of the funds expended under this law will go to help Catholics persuade their children that Catholicism is best than will go to help Jews or Protestants persuade their children that Judaism or Protestantism is best.

This Court has not addressed itself to the preferential aspects of these kinds of laws, perhaps because the statutes which have been upheld have involved peripheral services and such small amounts of money as to be deemed *de minimus* as they affected the competition among sects. But now we are talking about the reimbursement of tuition, a factor which obviously will affect the decisions of many parents to send or not send their children to parochial schools. We submit that Act 92, as compared to the Pennsylvania statute invalidated in *Lemon*, more closely approaches the worst evils intended to be eradicated by the First and Fourteenth Amendments.

It tends to establish a religion.

It disadvantages, and thus interferes with, other religions.

And, precisely because it has such a preferential effect, its potential for political divisiveness along religious lines is far greater.

E. Act 92 Interferes With Appellee's Free Exercise of Religion and Appellees Have Standing to Raise That Issue.

In assessing the sufficiency of the Second Count of the Complaint based upon the Free Exercise Clause, it should be noted that:

—The Complaint alleges that the Act authorizes payment for the tuition of students in educational institutions which "have as their purpose the teaching, propagation and promotion of a particular

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religious faith, conduct their operations, curriculums and programs to fulfill that purpose . . . [and] are an integral part of the religious mission of the sponsoring church." (Paragraph 10)

—The Complaint alleges that it "is against the religious conscience of each of the plaintiffs to be forced by operation of the taxing power to contribute to the propagation of religion . . . (Paragraph 6)

—Act 92 does not limit reimbursement payments to that part of the tuition which covers the cost of secular instruction.

If there is no constitutional or practical difference between a direct grant of governmental funds to religious schools and payment of tuition for attendance (as every court which has passed on the question has held) we have here a classical instance of governmental use of tax-raised funds for the teaching, propagation and promotion of religion.

Fundamental to the concept of religious freedom was the belief that it was destructive of personal freedom to compel any man to pay taxes for religious purposes. In fact, the history of the struggle for religious freedom in America is in large measure the history of the struggle against taxation for religious purposes. As early as 1644, a tanner named Briscoe in Massachusetts Bay Colony published a phamphlet against the church tax, arguing that such a method of supporting religion was immoral and contrary to justice.[29]

As the Court said in *Everson:*

> These practices became so commonplace as to shock the freedom-loving colonials into a feeling of abhor-

29. Cobb, *The Rise of Religious Liberty in America,* p. 170 (1902).

rence. The imposition of taxes to pay ministers' salaries and to build and maintain churches and church property aroused their indignation. It was these feelings which found expression in the First Amendment. No one locality and no one group throughout the Colonies can rightly be given entire credit for having aroused the sentiment that culminated in adoption of the Bill of Rights' provisions embracing religious liberty. But Virginia, where the established church had achieved a dominant influence in political affairs and where many excesses attracted wide public attention, provided a great stimulus and able leadership for the movement. The people there, as elsewhere, reached the conviction that individual religious liberty could be achieved best under a government which was stripped of all power to tax, to support, or otherwise to assist any or all religions, or to interfere with the beliefs of any religious individual or group.[30]

The Court then referred to the struggle against the tax levy for religion in Virginia, Madison's *Memorial and Remonstrance* which led to its success, and Jefferson's Statute for Establishing Religious Liberty which was a product of that success. It is significant that much of the *Memorial and Remonstrance* is framed in terms of religious liberty. Indeed, its very opening invokes the freedom of religion clause of the Virginia Declaration of Rights,[31] as does its close.[32] It is significant, too, that de-

30. *Everson, majority, supra,* note 1 at p. 11.

31. "Because we hold it for a fundamental and undeniable truth, 'that religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence'." *Id.* at 64.

32. "Because, finally, 'the equal right of every citizen to free exercise of his Religion according to the dictates of conscience' is held by the same tenure with all our other rights." *Id.* at 71.

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feat of the tax levy led immediately to the enactment of the Statute for Establishing Religious Liberty, whose principal provision is that "no man shall be compelled to frequent or support any religious worship, place or ministry whatsoever. * * *" [33]

It is true that the defeated Virginia Bill levying taxes for the support of religious teachers sought to impose a specific tax rather than direct an appropriation from the state's general treasury. This, however, is also true of Act 92. The funds appropriated thereunder do not come from the general treasury but specifically from the cigarette tax.[34] Indeed, in one important aspect Act 92 constitutes an even more serious infringement on religious liberty than the Virginia Bill. Under that Bill each taxpayer had the privilege of designating the religion or denomination to which his tax was to go.[35] A Catholic cigarette smoker in Pennsylvania, however, has no way of insuring that no part of the tax he pays (which over a period of years can be quite substantial, far more so than the "three pence" referred to in the *Memorial and Remonstrance*) will be used to pay for the teaching and propagation of Protestant or Jewish doctrines.

We do not mean to suggest that Act 92 would not violate the Free Exercise Clause if the funds for its effectuation came out of the state's general treasury rather than the cigarette tax. In the complexities of modern society and government, it is often impracticable to impose specific taxes for a specific purpose. Yet the underlying principle

33. *Id.* at 13.

34. We consider it unnecessary to rebut any suggestion that the Free Exercise Clause is inapplicable because nobody is required to buy cigarettes. No such suggestion is made in any of the briefs for dismissal.

35. It is for that reason that the Virginia Statute states "that even the forcing him to support this or that teacher of his own religious persuasion, is depriving him of the comfortable liberty of giving his contributions to the particular pastor, whose morals he would make his pattern." *Id.* at 13.

is the same; the compulsion is not eliminated simply because no part of the taxpayer's bill is earmarked to finance the appropriation. This was recognized by the Virginia Supreme Court in *Almond v. Day*[36] in its holding that the state's tuition law was unconstitutional on the ground, among others, that it "compels taxpayers to contribute money for the propagation of religious opinions which they may not believe."

This, too, was implicitly recognized by the United States Supreme Court in *Flast v. Cohen*.[37] In that case the Court quoted from *Baker v. Carr*[38] to the effect that standing depends on whether the plaintiff has alleged "a personal stake in the outcome of the controversy." The Court then held that every taxpayer in the United States has such a personal stake to challenge a Federal expenditure out of its general funds alleged to be in support of religious schools and religious instruction. The reason for this is that it is the plaintiff's money, no matter how small in amount, that is being used for the purpose. We submit that it necessarily follows that even if the plaintiff is a general taxpayer rather than, as in the present case, a member of a specific class upon whom the tax is levied, he is being taxed to support religion and therefore has standing to assert the Free Exercise Clause.

It is true that in *Board of Education v. Allen*,[39] the Court rejected a claim under the Free Exercise Clause in a challenge to the constitutionality of the New York secular textbook loan law. But that case is clearly distinguishable for at least the following reasons:

—Since the Court held that the law did not involve the use of public funds for the support of religious

36. See note 10, *supra*.

37. 392 U. S. 83, 99 (1968).

38. 369 U. S. 186, 204 (1962).

39. See note 7, *supra* at p. 249.

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schools or religious teaching, there obviously was no violation of the Free Exercise Clause. In the present case, of course, the funds are being used for the support of religious schools and religious teaching.

—The plaintiffs in that case were not taxpayers and were not suing as such. They were members of a local school board who sued because they were of the opinion that by administering the law they would be violating their oath to uphold the Constitution, and if they refused to administer it they would be removed from office.[40]

—The Court pointed out in *Allen* that the plaintiffs "have not contended that the New York law in any way coerces them as individuals in the practice of their religion."[41] In the present case the Complaint (Paragraph 6) specifically alleges that it "is against the religious conscience of each of the plaintiffs to be forced by operation of the taxing power to contribute to the propagation of religion . . ."

II. THE EQUAL PROTECTION CLAIM.

Paragraph 11 of the Complaint alleges that:

The Act on its face and as construed and applied by the defendant authorizes and directs payments for the tuition of students in educational institutions which by purpose or effect segregate students by race, thereby perpetuating and promoting the segregation of races and two separate school systems in Pennsylvania—a public school predominantly black, poor and inferior and a private subsidized school system predominantly white, affluent and superior.

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40. *Id.* at 241 n. 5.

41. *Id.* at 249.

It is a fact, fully substantiated by many studies and of which the Court may take judicial notice, that some religious faiths have only a small percentage of blacks, that the vast majority of blacks are Protestants, far fewer are Catholics, and almost none are Jews. Hence if schools of these faiths limit admission to adherents of their respective faith the effect, although *not* the purpose, of subsidizing such schools is to perpetuate racial segregation as alleged in the Complaint.

Appellants had standing to raise this issue and the lower Court should not have dismissed this Count of the Complaint on the authority of its earlier opinion in *Lemon v. Kurtzman*, 310 F. Supp. 35 (E. D. Pa. 1969).

In this Court's opinion in *Lemon v. Kurtzman*, the racial claim was not passed upon or considered. But Mr. Justice Brennan, in his concurring opinion, stated expressly:

> * * * Appellants allege that the nonpublic schools are segregated in Pennsylvania by race and religion and that the Act perpetuates and promotes the segregation of the races "with the ultimate result of promoting two school systems in Pennsylvania—a public school system predominantly black, poor and inferior and a private subsidized school system predominantly white, affluent and superior." * * * The District Court held that appellants lacked standing to assert this equal protection claim. *In my view this was plain error.*[42] (emphasis added)

Mr. Justice Brennan's position, we respectfully submit, is more realistic and more in accord with current constitutional principles and policies than the narrow view of standing expressed by the District Court in *Lemon*.

42. *Lemon, supra*, note 3 at p. 2127.

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Considering the appellee Lemon alone, the Complaint herein (and in *Lemon*) alleges that he is the parent of a black child attending public school in Pennsylvania. It is true that the Complaint does not allege that he sought admission for the child in a nonpublic school and that admission was denied. But is that the sum total of Lemon's interest in the controversy? We respectfully submit that it is not.

Appellee *Lemon* may well prefer not to send his child to a school restricted to children of his faith. He may well wish that the child be educated in a school community which truly reflects pluralistic America, a school in which the child can live and learn together with children of all religious faiths and of none. Does he not have an interest that the public school which the child attends shall not be made racially segregated by the state through the means of subsidizing attendance at virtually all-white nonpublic schools? Assuming that Lemon is a Catholic, may the State of Pennsylvania force him to choose between sending his child to an all Catholic or an all black school? And if it may not, does he not have standing to sue to prevent it?

What is true of Lemon is also true of his white co-appellees. The Complaint alleges that pupils in religious schools must participate in religious instruction and worship. Suppose their consciences forbid this. Must they sacrifice their religious freedom to avoid sending their children to a racially segregated school?

It was not the purpose of those who founded America's religious school systems that they should become places of refuge for whites fleeing blacks. Nor is this the purpose of the religious leaders who strive in a time of mounting educational costs to maintain those systems. And that is also not the purpose of the legislatures which appropriate public funds for the support of religious

schools so that those schools may continue to exist. It is, however, unfortunately the purpose of many *parents*, North and South, who send their children to nonpublic schools. And it is an effect, and increasingly a primary effect, of laws which appropriate tax-raised funds to support or subsidize attendance at such schools.

The effect may well be even more serious. It is not too much to suggest that the preservation of the egalitarian, multiracial and multireligious public school system envisioned by its founders rests upon the outcome of the intense struggle for governmental financing of nonpublic schools. To the extent that the public schools, particularly in urban areas, remain multiracial, the unfortunate explanation is that almost all the white children attending them are members of middle income families who simply cannot afford to pay the tuition and other expenses in nonpublic schools. These middle income white children are the flesh and blood of a multiracial public school system. Should the time come when through increasing governmental support of nonpublic schools either directly or through subsidization of attendance by tuition payments, it will be economically feasible for white middle income parents to send their children to nonpublic schools, the public school system will become the modern day equivalent of the pre-public education charity school—an institution for the children of the poor, most of whom will be members of racial minorities. We will then end up with two school systems—separate and unequal.

We submit that each of the appellees in this suit, as well as all Americans, have vital interests in preventing this from happening. Certainly, then, they have a constitutionally protected interest that government shall not actively participate through the use of its taxing and spending powers in such a tragic development. Therein lies their standing to raise the Equal Protection Clause.

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CONCLUSION.

For the foregoing reasons, appellees request that the judgment of the District Court holding Act 92 unconstitutional, be affirmed.

Respectfully submitted,

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Attorneys for Appellees.

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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-459

SLOAN, ET AL.

v.

LEMON, ET AL.

No. 72-620

CROUTER

v.

LEMON, ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

OPINION BELOW

The opinion of the district court (App. 37a–56a, 87a) is reported at 340 F. Supp. 1356.

JURISDICTION

The judgment of the district court was entered on July 21, 1972 (App. 87a). The notices of appeal were

filed in No. 72–459 by appellants Jose Diaz, *et al.* on August 8, 1972, and by Grace Sloan on August 14, 1972, and in No. 72–620 on August 21, 1972. Probable jurisdiction was noted on January 22, 1973 (App. 93a). The jurisdiction of this Court rests on 28 U.S.C. 1253.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States provides in relevant part:

> Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof, * * *.

The Pennsylvania Parent Reimbursement Act for Nonpublic Education, 24 Pa. Stat. Ann. § 5701 *et seq.* is set forth at App. 56a–63a.

QUESTION PRESENTED

Whether the Pennsylvania Parent Reimbursement Act for Nonpublic Education, under which the State reimburses parents for a portion of the tuition fees they have paid for sending their children to nonpublic (including religiously-affiliated) schools violates the Establishment Clause of the First Amendment, which applies to the States under the Fourteenth Amendment.

INTEREST OF THE UNITED STATES

It is the policy of the United States to improve the quality of education and to promote the maximum availability and utilization of educational resources, while respecting the rights of parents to send

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their children to nonpublic schools which they believe best meet their children's needs. Nonpublic (including religiously-affiliated) schools have a major role in American education. They relieve the State of the substantial financial burden that would result if the children now attending nonpublic schools were to transfer to the public schools. They make possible the implementation of a diversity of educational philosophies within a single community—a diversity which enriches and strengthens the educational system.

As the President stated in his message to Congress on Educational Reform on March 3, 1970:

> * * * The non-public elementary and secondary schools in the United States have long been an integral part of the nation's educational establishment—supplementing in an important way the main task of our public school system. The non-public schools provide a diversity which our educational system would otherwise lack. They also give a spur of competition to the public schools—through which educational innovations come, both systems benefit, and progress results.
>
> Should any single school system—public or private—ever acquire a complete monopoly over the education of our children, the absence of competition would neither be good for that school system nor good for the country. The non-public schools also give parents the opportunity to send their children to a school of their own choice, and of their own religious denomination. They offer a wider range of possibilities for education experimentation and special

opportunities for minorities, especially Spanish-speaking Americans and black Americans.

Up to now, we have failed to consider the consequences of declining enrollments in *private* elementary and secondary schools, most of them church supported, which educate 11% of all pupils—close to six million school children. In the past two years, close to a thousand nonpublic elementary and secondary schools closed and most of their displaced students enrolled in local public schools.

If most or all private schools were to close or turn public, the added burden on public funds by the end of the 1970s would exceed $4 billion per year in operations, with an estimated $5 billion more needed for facilities. [H. Doc. No. 91–267, 91st Cong., 2d Sess., p. 9.]

STATEMENT

This is a suit to enjoin enforcement of the Pennsylvania Parent Reimbursement Act for Nonpublic Education, 24 Pa. Stat. Ann. § 5701 *et seq.*, on the grounds that the Act violates the Establishment and Free Exercise Clauses of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment (App. 8a–9a).[1] The plaintiffs are individual citizens and taxpayers of Pennsylvania (one of whom, appellee Lemon, also is the parent of a Negro child attending a Pennsylvania public school) (App. 6a). The defendants are the Treasurer of Pennsylvania and

[1] The district court dismissed counts two (Free Exercise) and three (Equal Protection) of the complaint on the authority of *Lemon* v. *Kurtzman*, 403 U.S. 602 (App. 64a).

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individual residents of Pennsylvania who are parents of students in nonpublic schools (App. 6a, 17a, 20a).

The statute, which was adopted in August 1971, is based upon legislative findings that parents who send their children to nonpublic schools "assist the State in reducing the rising costs of public education" and "provide a vital service to the Commonwealth"; that "[i]n the exercise of their constitutional right to choose nonpublic education for their children, parents who support such education make a major contribution to the public welfare," but that the "immense impact of inflation, plus sharply rising costs of education, now combine to place in jeopardy the ability of such parents fully to carry this burden"; and that "[s]hould parents of children now enrolled in nonpublic schools be forced by economic circumstances to transfer any substantial number of their children to public schools, an enormous added financial, educational and administrative burden would be placed upon the public schools and upon the taxpayers of the State," which "would be an intolerable public burden and present standards of public education would be seriously jeopardized" (App. 57a–58a).[2]

"[I]n order to reimburse parents partially for this service so vitally needed by the Commonwealth, and

[2] The legislature found that (App. 57a–58a):

> Without allowance for inflationary increase, the annual operating cost of educating in public schools, the five hundred thousand students now enrolled in Pennsylvania nonpublic schools would be an additional four hundred million dollars ($400,000,000). Necessarily added capital costs to construct new facilities or acquire existing facilities would be in excess of one billion dollars ($1,000,000,000). * * *

in order to foster educational opportunity for all children," the State established "a program of Parent Reimbursement for Nonpublic Education" (App. 58a). It provides that resident parents who file a verified statement that their child has completed a school year in a nonpublic school within the State that meets the requirements of the State's compulsory school attendance law [3] and of Title VI of the Civil Rights Act of 1964 (which prohibits discrimination) are entitled to a tuition reimbursement payment of $75 for each elementary school student and $150 for each secondary school student, or, if less, the actual amount of tuition paid.[4]

Reimbursement is provided from the Parent Reimbursement Fund into which is paid 23 percent of the revenue collected from the State's cigarette tax (App. 60a). The responsibility for administering the program is in the Pennsylvania Parent Assistance Authority, which consists of five non-compensated members appointed by the governor. The Act provides that the Authority "shall exercise no direction, supervision or control over the policy determinations, personnel, curriculum, program of instruction or any other aspect of the administration or operation of any nonpublic school or schools" (App. 60a).

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[3] Every child residing in Pennsylvania between the ages of 8 and 17 is required to attend a school in which subjects and activities prescribed by the State Board of Education are taught. 24 Pa. Stat. Ann. §§ 13-1326, 13-1327.

[4] The statement is to be filed at the completion of the school year but not later than July fifteenth. Payments are to be made not later than September fifteenth (App. 61a).

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The defendants moved to dismiss the complaint on the ground of failure to state a claim upon which relief can be granted (App. 12a, 26a, 31a). A three-judge district court concluded that "the Establishment Clause precludes state reimbursement of sums that parents have paid as tuition to schools that provide religious education" and denied the motion to dismiss (App. 55a). The court, relying on the legislative determination of policy, ruled that "the Act expresses a legitimate secular objective consistent with the Establishment Clause" (App. 43a). The court held, however, that "the Act has the primary effect of advancing religion" (App. 43a).

It stated that "the fact that aid is given to parents in itself does not prevent the subsidy from having a primary effect of supporting religious instruction and worship in church-related schools" (App. 51a), and that "the court must examine the character of the aided activity rather than the manner in which aid is given in order to determine whether the state subsidy has the primary effect of advancing religion" (*ibid.*). It concluded that since "the effect of the Act is to aid the schools * * * the failure of the state to insure that the funds are restricted to secular education or general welfare services renders the Act unconstitutional" (*id.* at 51a–52a). Finally, it held that even if 'the Act does not aid sectarian schools, we must still conclude that the Act supports religion because it aids parents in providing a religious education for their children" (App. 54a).

Based upon this opinion, the court thereafter granted the plaintiffs' motion for summary judgment and enjoined the payment of any funds under the Parent Reimbursement Act for Nonpublic Education "either directly or by way of reimbursement to parents of children attending nonpublic schools" (App. 87a).[5]

ARGUMENT

THE PENNSYLVANIA STATUTE SATISFIES THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT BECAUSE ITS PURPOSE AND EFFECT ARE PRIMARILY SECULAR, AND IT DOES NOT INVOLVE EXCESSIVE GOVERNMENT ENTANGLEMENT WITH RELIGION

INTRODUCTION AND SUMMARY

1. In a series of landmark decisions, this Court has marked out certain areas of government aid to religious institutions that are permissible under the Establishment Clause of the First Amendment, and other areas that the clause prohibits. On the one hand, the State may aid religious institutions indirectly, such as through tax exemptions (*Walz* v. *Tax Commission*, 397 U.S. 664), reimbursement of parents for bus fares paid for children attending religiously-affiliated schools (*Everson* v. *Board of Education*, 330 U.S. 1), or supplying of books to children attending such schools (*Board of Education* v. *Allen*, 392 U.S. 236). On the other hand, the Establishment Clause pro-

[5] The plaintiffs' affidavits in support of the motion for summary judgment recite only that the plaintiffs are citizens, residents and taxpayers of Pennsylvania and have purchased cigarettes and paid the Pennsylvania cigarette tax (App. 81a-83a).

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hibits any direct government aid to purely religious activities (*McCollum* v. *Board of Education*, 333 U.S. 203), and any aid to the secular aspects of religiously-affiliated schools where the government's action to insure that the funds are used exclusively for secular purposes itself involves excessive government entanglement in religion (*Lemon* v. *Kurtzman*, 403 U.S. 602). Between these two boundaries "there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference" (*Walz*, *supra*, 397 U.S. at 669). The Court's function is "to define the boundaries of the neutral area between these two provisions within which the legislature may legitimately act" (*Tilton* v. *Richardson*, 403 U.S. 672, 677).

The present case is not squarely controlled by previous decisions of this Court. We submit, however, that the rationale of those decisions indicates that the Pennsylvania Parent Reimbursement Act satisfies the Establishment Clause. Under this Act the State is completely neutral in its relationship to religion. It makes no grants directly to the religiously-affiliated schools. The decision whether to send their children to such schools is made exclusively by the parents; the parents are entitled to the same reimbursement whether their children attend a nonpublic school with no religious affiliation at all (as is true of several of the defendants in the case), or one with a church affiliation. There is no State entanglement—let alone any excessive entanglement—in the operation of the schools; the State's only administrative function is to

check that the school for which tuition reimbursement is sought is accredited under State law, and to make the payment to the parents.

The Pennsylvania Act thus furthers the "benevolent neutrality" (*Zorach* v. *Clauson*, 343 U.S. 306, 314) toward religion which is the essence of the religious clauses of the First Amendment. The benefits that the Act provides for religiously-affiliated schools are fundamentally no different from those which the Court upheld as consistent with the Establishment Clause in the *Everson* and *Allen* cases: the provision of financial aid to parents who send their children to such schools. The fact that the State financial aid to the parents "make[s] it more likely that some children choose to attend a sectarian school * * * does not alone demonstrate an unconstitutional degree of support for a religious institution" (*Allen, supra*, 392 U.S. at 244).

2. The Court summarized in *Lemon* v. *Kurtzman*, 403 U.S. 602, the three criteria which it has applied in determining whether a statute satisfies the Establishment Clause (pp. 612–613):

> First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, *Board of Education* v. *Allen*, 392 U.S. 236, 243 (1968); finally, the statute must not foster "an excessive government entanglement with religion." *Walz* [397 U.S. 664], 674.

The Pennsylvania Parent Reimbursement Act is valid under these criteria. As the district court correctly concluded, the Act has a secular purpose, since it was designed to assist parents in maintaining stu-

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dents in nonpublic schools and to foster educational opportunity for all children.

The district court erred, however, in concluding that the effect of the Act is improperly to advance religion. The issue is not, as the district court viewed it, whether under the Act government funds possibly could be used to promote religion, but whether the primary effect of the Act is to do so. The primary effect of the Act is to aid parents in maintaining students in nonpublic schools, and thereby to foster pluralism in education and to provide parents with maximum freedom of choice in selecting the schools their children will attend. As indicated, the incidental benefit to religiously-affiliated schools resulting from the attendance of some students who might have otherwise been unable to attend does not constitute an unconstitutional support of religion.

The Act does not involve excessive entanglement between government and religion. There is no administrative contact between the State and any religiously-affiliated school. The Act requires only a parental application for reimbursement; it specifically precludes intrusion by the administrative authority into the programs or operations of nonpublic schools. The program is financed by a self-executing fund which does not rely on legislative appropriations, so that the potential for political divisiveness is minimized.

A. *The Pennsylvania Parent Reimbursement Statute has a secular purpose*

The stated purpose of the Parent Reimbursement Act was to reimburse parents in part for the vital

service they perform for the State in maintaining students in nonpublic schools and to foster educational opportunity for all children (App. 58a). The legislative findings in the Act reflect the concern of the Pennsylvania General Assembly that an intolerable public burden would be placed upon the taxpayers of the State and that present standards of public education would be seriously jeopardized if a substantial number of parents of children who attend nonpublic schools were forced by economic circumstances to send their children to public schools (App. 57a–58a).

The Act also furthers the legitimate state interest in maintaining pluralism in education, and thus permitting a wider range of educational experimentation and recognition of special educational needs than would be available if there were no alternative to public primary and secondary schools.

As the district court correctly concluded, "the Act expresses a legitimate secular objective consistent with the Establishment Clause" (App. 43a). An Act designed to avoid heavy tax burdens and to safeguard the quality of education in all schools has a secular purpose. Cf. *Lemon* v. *Kurtzman, supra,* 403 U.S. at 613. There is nothing in the record which undermines the stated legislative intent or indicates that the purpose of the Act was to advance religion. *Lemon* v. *Kurtzman, supra,* 403 U.S. at 613; *Board of Education* v. *Allen, supra,* 392 U.S. at 243.

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B. *The primary effect of the Pennsylvania Parent Reimbursement Staute neither advances nor inhibits religion*

Under the criteria applied by this Court, a legislative enactment violates the Establishment Clause if its principal or primary effect is to advance or inhibit religion. The district court concluded that a "statute has the effect of advancing religion if the terms of the statute fail to preclude a possible use of government funds to promote religious exercises" (App. 49a); and that the Act was invalid because its effect "is to aid the schools" without insuring that "the funds are restricted to secular education or general welfare services" (App. 51a) and "because it aids parents in providing a religious education for their children" (App. 54a). The conclusions, however, do not show that the *primary* effect of the Act is to aid religion.

1. The mere fact that the Act may aid religiously-affiliated schools does not itself invalidate it, for "[t]he simplistic argument that every form of financial aid to church-sponsored activity violates the Religion Clauses was rejected long ago * * *." *Tilton* v. *Richardson, supra,* 403 U.S. at 679. The Court has upheld, as consistent with the Establishment Clause, such aids to religious institutions as the reimbursement of parents of school children for bus transportation expenses in attending parochial schools (*Everson* v. *Board of Education,* 330 U.S. 1), the lending by the state of textbooks to all school children, including those attending religiously-affiliated schools (*Board of Education*

v. *Allen*, 392 U.S. 236), and federal grants to Catholic colleges to be used for secular purposes (*Tilton* v. *Richardson*, 403 U.S. 672). As the Court explained in *Tilton* v. *Richardson*, *supra*, 403 U.S. at 679, "[t]he crucial question is not whether some benefit accrues to a religious institution as a consequence of the legislative program, but whether its principal or primary effect advances religion."

In *Everson* the Court upheld the reimbursement to parents of Catholic school students of public bus fares expended in traveling to and from school, although the Court noted (330 U.S. at 17):

> It is undoubtedly true that children are helped to get to church schools. There is even a possibility that some of the children might not be sent to the church schools if the parents were compelled to pay their children's bus fares out of their own pockets when transportation to a public school would have been paid for by the State.[6]

Similarly, in *Allen*, the Court stated (392 U.S. at 244):

> Perhaps free books make it more likely that some children choose to attend a sectarian school, but that was true of the state-paid bus fares in *Everson* and does not alone demon-

[6] Considering the changed economic conditions in the 25 years since *Everson*, the financial assistance provided to parents by the payment of the bus fares in *Everson*, which averaged $40 per year per child (*Everson*, *supra*, 330 U.S. at 56, n. 51, Rutledge, J., dissenting) may not be too different in its practical effect on the family's ability to maintain a child in a nonpublic school than the reimbursements provided under the instant Pennsylvania Act.

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strate an unconstitutional degree of support for a religious institution.

For like reasons, the district court erred in holding that the Act also supports religion "because it aids parents in providing a religious education for their children" (App. 54a). As *Everson* and *Allen* indicate, the Establishment Clause does not bar the state from aiding parents in sending their children to religiously-affiliated schools where, in most instances, the child will receive a religious education. To the contrary, such aid, which merely makes it easier for the parents who want to send their children to such schools to do so, reflects, the very neutrality toward religion which the First Amendment requires.

The New York released-time statute upheld in *Zorach* v. *Clauson*, 343 U.S. 306, permitted public school students to be released from school at the request of their parents to receive religious instruction. Therefore it, like the Pennsylvania statute, enabled "parents to augment the public school secular education with religious training" (App. 55a). That fact, however, did not invalidate the New York statute as a prohibited state support of religion.

2. The purpose of the Establishment Clause is to insure that the government is neutral with respect to religious matters, that "no religion be sponsored or favored, none commanded, and none inhibited" (*Walz, supra*, 397 U.S. at 669). It seeks "a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference" (*ibid.*). As

Mr. Justice Harlan explained in his concurring opinion in *Walz* (pp. 694–695):

> * * * These related and mutally reinforcing concepts [of "voluntarism" and "neutrality"] are short-form for saying that the Government must neither legislate to accord benefits that favor religion over nonreligion, nor sponsor a particular sect, nor try to encourage participation in or abnegation of religion.

The Parent Reimbursement Act is completely consistent with these concepts; it promotes voluntarism while remaining neutral. See Areen, *Public Aid to Nonpublic Schools: A Breach in the Sacred Wall?*, 22 Case W. Res. L. Rev. 230, 247–248 (1971). Religion is not favored over nonreligion, nor is participation in or abnegation of religion encouraged. The reimbursement to the parents may not exceed the cost of the child's tuition—and ordinarily will be substantially less than that cost.[7] Thus, the Act's only effect is to reduce somewhat the economic obstacle to sending a child to a nonpublic school.

Rather than encouraging participation in religion, the state here is simply redressing to some extent the burden imposed on parents who send their children to religiously-affiliated schools. The state does not affirmatively encourage parents to use such schools; it merely aids them if they choose to do so. Without such

[7] The approximate amount of a year's tuition can be estimated from the fact that the cost to Pennsylvania of public school education in 1970–1971 was almost $1000 per pupil (Brief of Appellant Grace Sloan, p. 9).

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aid, those parents would be required not only to provide their share of the taxes which support the public schools, but also to bear alone the entire cost of the private school tuition. The Establishment Clause does not bar the state from increasing the parents' opportunity to make a free choice between sending their children to nonpublic or public schools by alleviating this double economic burden.

The Act leaves it completely within the discretion of the parent to decide whether to send his child to a private school and, if so, to which one. Since the tuition reimbursement is available for any child who attends a nonpublic school that satisfies the State's educational requirements, parents may obtain reimbursement for children who attend private schools that have no religious affiliation. The Pennsylvania statute does not favor religious over non-religious private schools.

In short, the State plays no role in the parents' decision whether to send a child to a religiously-affiliated school. What the Act does is to reduce one of the obstacles—the high cost of private school education—that might inhibit the parent from making a free choice between a religiously-affiliated and a public school. The Pennsylvania Act promotes voluntarism by alleviating one of the obstacles to the free exercise of the parents' religious preferences, but in a neutral manner which does not involve the government in any support or sponsorship of religion.

3. The fact that the aid goes to the parent and not to the school is crucial. In *Lemon* v. *Kurtzman, supra,* the Court pointed out (403 U.S. at 621):

> The Pennsylvania statute, moreover, has the further defect of providing state financial aid directly to the church-related school. This factor distinguishes both *Everson* and *Allen*, for in both cases the Court was careful to point out that state aid was provided to the student and his parents—not to the church-related school. * * *

Where the grant is made directly to the religiously-affiliated school, this Court has indicated that it is constitutionally necessary to insure that the aid so provided is used solely for secular functions. The state statutes in *Lemon* v. *Kurtzman*, 403 U.S. 602, were struck down because, in attempting to meet this constitutional requirement, they impermissibly entangled the State in religious affairs. *Id.* at 619. Similarly, in *Tilton* v. *Richardson*, 403 U.S. 672, it was necessary to provide that the federally-financed buildings of the religiously-affiliated colleges would continue to be used for secular purposes. *Id.* at 682–684.

In contrast, when the benefit is indirect, the fact that religious as well as secular functions may be assisted does not of itself render state action inconsistent with the First Amendment. In *Walz* v. *Tax Commission*, 397 U.S. 664, this Court indicated in approving a tax exemption which benefited both the secular and religious functions of the institutions involved that the fact that the benefit was indirect, rather than direct, was significant. *Id.* at 674–675. And in *Zorach* v. *Clauson*, 343 U.S. 306, the release of children from public school for religious instruction directly benefited the parents of the children; the

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indirect benefit to the religious institutions involved was not primarily to their secular functions. Nevertheless, this Court held the New York statute was consistent with the First Amendment.

Furthermore, as noted above, this Court recognized in both *Everson* and *Allen* that religiously-affiliated schools might receive benefits from the state actions there involved in the form of increased attendance. This benefit was not limited to the schools' secular functions. Nevertheless, the aid was indirect, and the benefit was permissible.

4. The application of the Establishment Clause to various forms of state assistance to religiously-affiliated institutions involves questions of degree. The form the aid takes may therefore be important because that factor often determines whether the state improperly is directly aiding religion or permissibly is merely giving parents and children financial assistance which indirectly benefits the schools. The decisions of this Court have drawn the line between direct aid to religiously-affiliated schools, which can only be given if aid is limited to the secular aspects of those schools and the state is not excessively entangled with religion (*Lemon* and *Tilton*); and aid to the parents and children, which is permissible even though its effect is to aid the entire school, including its religious aspects, by enabling children who might not otherwise be able to do so to attend such schools (*Everson* and *Allen*).

The present case accordingly cannot be disposed of on the oversimplified argument that since the state

could not make these grants directly to the schools, it cannot do so indirectly by reimbursing parents for part of the tuition they have paid to the schools. The determination whether a particular program of state assistance to religiously-affiliated schools violates the Establishment Clause requires a more sophisticated and subtle analysis. Under that analysis, the effect of the Pennsylvania parent reimbursement plan is primarily secular because the aid is given not to the schools themselves but to the parents, in order to assist the latter in sending their children to the schools of their choice. Such aid does not violate the Establishment Clause. Cf. *Lemon* v. *Kurtzman,* No. 71–1470, decided April 2, 1973, sl. op. 14 n. 7.

C. *The Pennsylvania statute does not involve excessive government entanglement with religion*

The remaining inquiry under the Establishment Clause is whether the Pennsylvania statute involves "an excessive government entanglement with religion." *Walz* v. *Tax Commission, supra,* 397 U.S. at 674. We submit that it does not.

The administrative relationships between government and religion under this Act are minimal. Because this Act, unlike the statute in *Lemon* v. *Kurtzman, supra,* 403 U.S. at 621, provides payment to the parent and does not have the "defect of providing state financial aid directly to the church-related school," the State is not required to police the schools to insure that the aid is used solely for its specified secular purposes. The Act bars the Pennsylvania Parent As-

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sistance Authority,[8] which administers the program, from exercising any "direction, supervision or control over * * * any * * * aspect of the administration or operation of any nonpublic school or schools" (App. 60a). A parent wishing to participate in the program merely files with the Authority a simple application stating that his child has completed the school year in a nonpublic school, identifying himself, the student, and the school, and including a receipted tuition bill or a copy of a contract obligating him to pay the tuition (App. 61a).[9]

Upon the filing of this statement, the Authority makes the reimbursement payment to the parent ($75 for each elementary school student and $150 for each secondary school student, but not more than the actual amount of tuition paid); it may employ means reasonably necessary to determine the accuracy of the statements (App. 61a), but may not become involved in any aspect of the administration or operation of any nonpublic schools (App. 60a).

The role of the state under this plan involves less governmental entanglement in religion than the application of state compulsory attendance laws to religiously-affiliated schools. There the state is required to examine the curriculum and instruction to insure that they meet the state standards. The state's role

[8] The five members of the Authority are appointed by the Governor for five-year terms, and serve without compensation (App. 59a).

[9] A copy of the application form is reproduced at pages 86a and 86½a of the Appendix.

in the application of those laws to religiously-affiliated schools has long been recognized as consistent with the Establishment Clause. See *Pierce* v. *Society of Sisters,* 268 U.S. 510, 534; cf. *Walz* v. *Tax Commission, supra,* 397 U.S. 664. The lesser state involvement under the Pennsylvania Parent Reimbursement Act similarly does not violate the Clause.

The state's role here falls far short of the excessive entanglement condemned in *Lemon* v. *Kurtzman, supra.* Each of the plans there involved state payments of part of the salaries of teachers in nonpublic schools. In one plan, the payments were made to the teachers, in the other they were made to the schools. In both plans, the payments covered only the teaching of specified secular subjects.

The Court recognized that because "a dedicated religious person, teaching in a school affiliated with his or her faith and operated to inculcate its tenets, will inevitably experience great difficulty in remaining religiously neutral. * * * [T]he potential for impermissible fostering of religion is present" (403 U.S. at 618–619). It noted that to insure that "subsidized teachers do not inculcate religion * * * a comprehensive discriminating, and continuing state surveillance will inevitably be required to ensure that these restrictions are obeyed and the First Amendment otherwise respected" (*id.* at 619). The present plan, however, involves no such state surveillance, but only the ministerial functions of checking the accreditation of the schools and paying the parents. Cf. also *Lemon* v. *Kurtzman,* No. 71–1470, decided April 2, 1973, sl. op. 9–11.

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Unconstitutional entanglement may also result from the divisive political potential of a state program—particularly the involvement of the legislature in making annual appropriations to finance the programs. *Lemon* v. *Kurtzman, supra*, 403 U.S. at 622. The Parent Reimbursement Act has no such potential. The State will not periodically be involved in determining either the amount to be expended on the program or the amount to be paid to individual parents in particular years. This program is self-financing. All the moneys are supplied by the Parent Reimbursement Fund, to which is transferred 23 percent of the State's revenues from its cigarette tax. Since the statute specifies a flat dollar amount of reimbursement for each child—$75 for elementary school students and $150 for secondary school students—it does not require any exercise of discretion by state authorities in determining the size of payments to parents.[10]

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[10] These factors distinguish the Pennsylvania Parent Reimbursement Act from the Ohio Parent Reimbursement Act which was invalidated in *Wolman* v. *Essex*, 342 F. Supp. 399 (S.D. Ohio), affirmed, 409 U.S. 808. The Ohio fund used to provide aid to the parents of nonpublic school children was dependent upon annual legislative appropriations (342 F. Supp. at 403, n. 3). The total amount of State funds to be distributed to parents was to be determined by the State Department of Education. In addition, that Department had statutory authority to issue guidelines which would permit reimbursement of various parental expenditures on nonpublic school education (342 F. Supp. at 414). The district court in *Essex* concluded (342 F. Supp. at 418) that "[t]o uphold this statute would be to introduce the religious issue to the very center of state politics." Pennsylvania has avoided this defect by eliminating the need for legislative appropriations and by providing for a purely ministerial administration of the Act that avoids state political involvement in the operation of the program.

* * * * * * *

In sum, the Pennsylvania Parent Reimbursement Plan has none of the features of state aid to religiously-affiliated schools that violates the Establishment Clause. The aid goes to the parents, not to the schools; the State is neutral in its attitude toward the schools; the plan involves no government entanglement in religion. Whatever aid the plan gives to the schools is indirect and constitutes the collateral consequence of easing the financial burden of parents who elect to send their children to nonpublic schools. In thus aiding parents in exercising their freedom to provide their children with an education that differs from that offered in the public schools, including the freedom to select a school that differs from the public schools precisely because it combines religious education with secular training, the Pennsylvania plan reflects a "benevolent neutrality" (*Walz, supra,* 397 U.S. at 677) toward religion. It is in the true spirit of the religious clauses of the First Amendment, whose basic intent is to allow each individual to act in the fullest freedom of conscience, without government restraint or encouragement.

Aid of this type, although not as venerable as tax immunity for churches (*Walz, supra,* 397 U.S. at 676–678), nevertheless has been an accepted part of our political system for many years. Under various statutes providing educational benefits to veterans, the government has paid tuition for hundreds of thousands of veterans of recent wars, including many who have attended religiously-affiliated institutions of various kinds. It has never been thought necessary

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that the benefits be limited to those attending purely secular institutions (see, *e.g.*, 38 U.S.C. 1651, *et seq.*). It was a quarter of a century ago that this Court in *Everson* upheld the constitutionality of reimbursement for bus fares for transporting children to nonpublic schools.

Although the present precise form of this type of aid may be novel, the underlying principle is not: that the State acts consistently with the Establishment Clause when it provides financial assistance to parents who send their children to religiously-affiliated schools, even though the effect of such assistance is indirectly to benefit the schools by permitting children to attend them who might otherwise not be able to do so.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed.

Respectfully submitted.

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APRIL 1973.

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* In lieu of the Solicitor General, who is disqualified for personal reasons.

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IN THE

Supreme Court of the United States

Nos. 72-459 & 72-620

GRACE SLOAN, as State Treasurer of the Commonwealth of Pennsylvania, *et al.*,
Appellants,
v.
ALTON J. LEMON, *et al.*,
Appellees.

Supreme Court, U.S.
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HENRY E. CROUTER,
Appellant,
v.
ALTON J. LEMON, *et al.*,
Appellees.

On Appeal from the United States District Court for the Eastern District of Pennsylvania

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF AMICUS CURIAE ON BEHALF OF THE NATIONAL EDUCATION ASSOCIATION AND THE HORACE MANN LEAGUE

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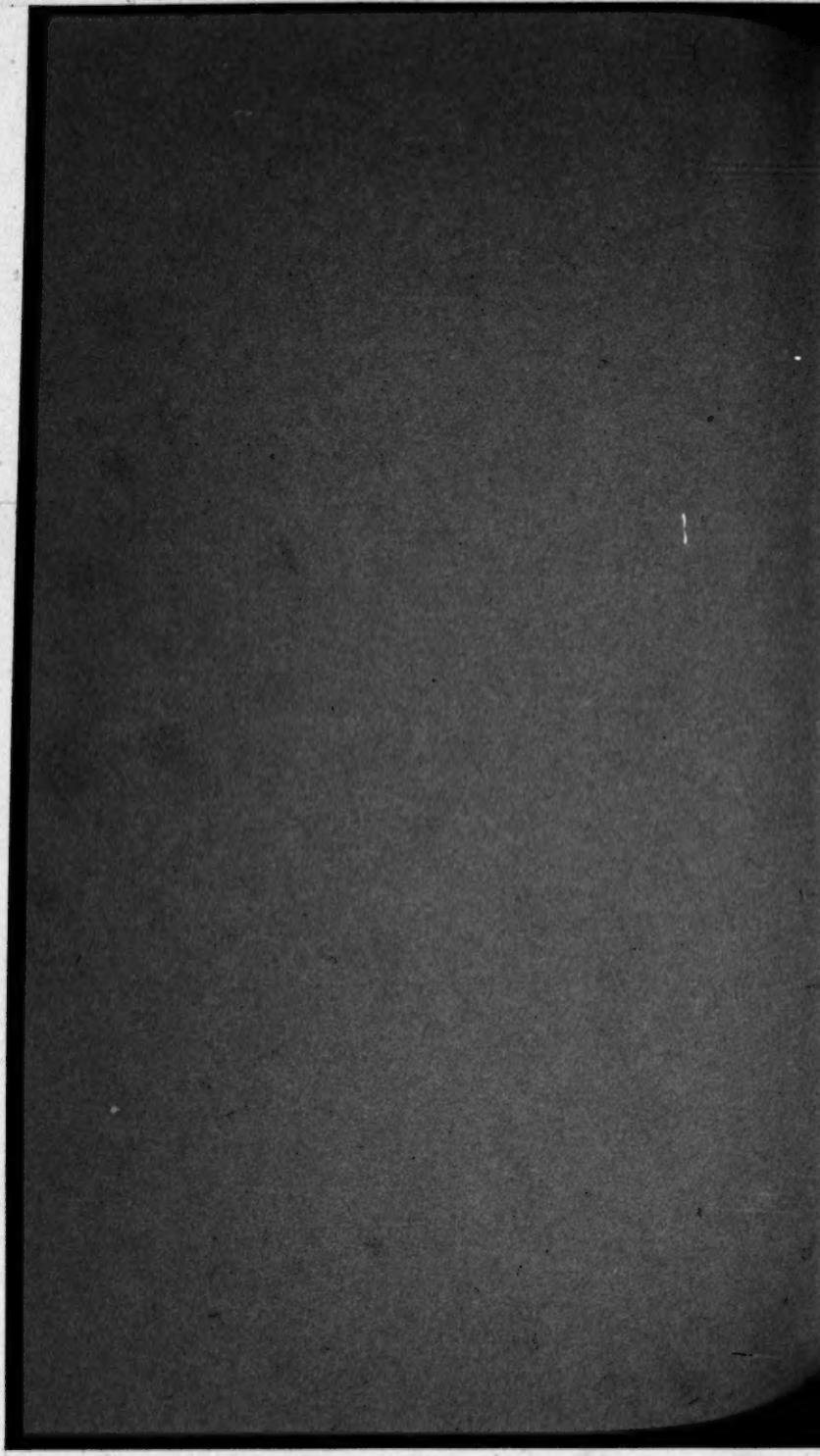

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Pennsylvania Parent Reimbursement Act for Nonpublic Education, Act of August 27, 1971, No. 92, Pa. Stat. Ann., tit. 24, § 5701, *et seq.* ..... *passim*

Rules:

Federal Rules of Appellate Procedure, Rule 26(c) 5
Federal Rules of Civil Procedure, Rule 6(e) 5
Supreme Court Rule 41(2) 4
Supreme Court Rule 42 ..... 1, 2, 4

Miscellaneous:

Amicus Brief for National Education Assoication *et al.* in *Committee for Public Education & Religious Liberty* v. *Nyquist*, No. 72-694 ..... *passim*
Bernardin, "Catholic Education Serving a Troubled Society," in Report of the Proceedings and Selected Addresses at the Sixty-Sixth Annual Convention of the National Catholic Educational Association, Detroit, Michigan, April 7-10, 1969, 66 NCEA Bulletin, No. 1, at 7 (August 1969) 10-11
Bureau of Educational Statistics, Pennsylvania Department of Education, Projections: Selected Educational Statistics for Pennsylvania to 1981-82 (1972) 14

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IN THE

Supreme Court of the United States

Nos. 72-459 & 72-620

GRACE SLOAN, as State Treasurer of the Commonwealth of Pennsylvania, *et al.*,

Appellants,

v.

ALTON J. LEMON, *et al.*,

Appellees.

HENRY E. CROUTER,

Appellant,

v.

ALTON J. LEMON, *et al.*,

Appellees.

On Appeal from the United States District Court for the Eastern District of Pennsylvania

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE ON BEHALF OF THE NATIONAL EDUCATION ASSOCIATION AND THE HORACE MANN LEAGUE

The National Education Association and the Horace Mann League hereby move, pursuant to Rule 42 of the Rules of the Court, for leave to file the attached brief amicus curiae on the merits of the cases at bar, in support of appellees. Both sides in No. 72-620 and the ap-

pellees in No. 72-459 have consented to our filing this brief, but appellants in No. 72-459 have not.[1]

I. INTEREST OF AMICI

The National Education Association (NEA) is an independent, voluntary organization of educators open to any person who is actively engaged in the profession of teaching or other educational work, or any other person interested in advancing the cause of education. It is the largest professional organization in the nation. Currently, NEA has over one million, one hundred thousand regular members, the large majority of whom serve public school systems in the various States.

The Horace Mann League is an independent national organization of some five hundred leading educators. The League exists to perpetuate the ideals of Horace Mann; its basic purposes are to strengthen public education and to preserve the American tradition of separation of church and state.

These appeals involve a challenge to the constitutionality of the Pennsylvania Parent Reimbursement Act for Nonpublic Education. This Act provides for tuition reimbursement payments to parents of children attending qualified nonpublic elementary and secondary schools. Approximately 90% of the children who attend such nonpublic schools in Pennsylvania are enrolled in religious schools. Appellees claim that the Pennsylvania statute violates the Establishment Clause of the First Amendment of the United States Constitution.

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[1] The letters of consent have been filed with the Court. Since both sides in No. 72-620 have consented, it may be that no motion is necessary for us to file this amicus brief. Since the two cases have been consolidated, however, and since Rule 42(2) speaks of the consent of *all* parties, we believe that we are required to proceed by way of motion.

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NEA and the Horace Mann League acknowledge the contributions made by private sectarian educational institutions in this country. Nonetheless, we are concerned over diversion of public money to the support of those institutions and the impact of such support upon the future of public education. We seek leave to file this brief because the Pennsylvania statute would bring about such a diversion.

The maintenance of a system of public education is a "paramount responsibility" that "ranks at the very apex of the function" of a State. *Wisconsin* v. *Yoder*, 406 U.S. 205, 213 (1972). See also *Brown* v. *Board of Education*, 347 U.S. 483, 493 (1954). Public funding of sectarian schools, whether through direct subsidy or through indirect means such as tuition reimbursements to parents of children who attend them, could have a serious effect on the capability of the public schools to discharge this "paramount responsibility." First, such funding would divert badly needed public money to these religious institutions or to those who support them. There is at this time a financial crisis not only in private education, but also in public education. The one crisis ought not be alleviated by means that exacerbate the other. Second, such funding could lead to a renewal of the often bitter church-state controveries which the First Amendment seeks to avoid and the injury to the educational environment in the public schools that such religious divisiveness would engender.

Lastly, to the extent that funding of private sectarian education increases the enrollment at such schools, it will reduce the pluralistic composition of public school student bodies so vital to the democratic ideal and to the educational process itself. See President's Commission on School Finance, *Schools, People and Money: The Need for Educational Reform*, pp. xix, 15 (March 3, 1972). Mr. Justice Brennan, concurring in *School District* v.

Schempp, 374 U.S. 203, 241-242 (1963), expressed this important aspect of American public education in the following terms:

> ". . . [T]he American experiment in free public education available to all children has been guided in large measure by the dramatic evolution of the religious diversity among the population which our public schools serve. . . . It is implicit in the history and character of American public education that the public schools serve a uniquely *public* function: the training of American citizens in an atmosphere free of parochial, divisive, or separatist influences of any sort—an atmosphere in which children may assimilate a heritage common to all American groups and religions [citation omitted]." (Emphasis in original.)

Part II of our amicus brief presents statistics which are matters of public record and from which may be computed the percentage of all nonpublic school children in Pennsylvania who attended religious schools in the years 1969-70, 1970-71, and 1971-72. No other brief that we have seen presents statewide statistics which are as current.

II. TIMELINESS

The attached amicus brief supports the position of appellees in the two consolidated cases and must therefore be "presented within the time allowed for the filing of the appellees' brief." Supreme Court Rule 42(2). Appellees' brief was due thirty days after their receipt of appellants' briefs. Supreme Court Rule 41(2).

Appellants' briefs were filed on March 2nd (Appellants Diaz *et al.* and Appellant Crouter) and on March 6th (Appellant Sloan). The office of counsel for appellees was unable to tell us exactly when these briefs were received. The certificate of service filed with the Court by counsel for Appellant Sloan states that the parties were served

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by mail. We believe that we are entitled to the general presumption in the Federal Rules of Civil Procedure, Rule 6(e), and the Federal Rules of Appellate Procedure, Rule 26(c), that service by mail takes three days. Accordingly, the thirty-day period for the filing of appellees' brief, and supporting amicus briefs, would be computed from March 9th. Such a computation yields April 9th as the due date (since April 8th is a Sunday).

This motion is being filed on or before April 9, 1973.

CONCLUSION

Wherefore, the National Education Association and the Horace Mann League request that this Court grant leave to file the accompanying brief amicus curiae urging affirmance of the judgment below.[2]

Respectfully submitted,

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[2] The National Education Association and the Horace Mann League have already filed a brief amicus curiae in No. 72-694, *Committee for Public Education & Religious Liberty* v. *Nyquist* (motion for leave to file granted March 26, 1973), involving an attack on the New York statute which provides for tax benefits for parents who have paid tuition for their children to attend nonprofit, nonpublic elementary and secondary schools in New York State.

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IN THE

Supreme Court of the United States

Nos. 72-459 & 72-620

GRACE SLOAN, as State Treasurer of the Commonwealth of Pennsylvania, *et al.*,
Appellants,

v.

ALTON J. LEMON, *et al.*,
Appellees.

HENRY E. CROUTER,
Appellant,

v.

ALTON J. LEMON, *et al.*,
Appellees.

On Appeal from the United States District Court for the Eastern District of Pennsylvania

BRIEF AMICUS CURIAE ON BEHALF OF THE NATIONAL EDUCATION ASSOCIATION AND THE HORACE MANN LEAGUE

The nature of the interest of the amici curiae is set forth in the preceding motion for leave to file. Amici adopt the Statement of the Case set forth at pages 4 to 9 of the Brief for Appellants Diaz *et al.*, in No. 72-459.

ARGUMENT

I. INTRODUCTION

The district court in this case, in its opinion denying appellants' motions to dismiss the complaint for failure to state a cause of action (App. 37a), declared the Pennsylvania Parent Reimbursement Act for Nonpublic Education unconstitutional under the Establishment Clause of the First Amendment because it found that the Act violates the "primary effect" test set out as one of the three tests in *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971):

> "First, the statute must have a secular legislative purpose; *second, its principal or primary effect must be one that neither advances nor inhibits religion,* . . . ; finally, the statute must not foster 'an excessive government entanglement with religion.' . . ." (Emphasis added.) 403 U.S. at 612-13.

From the wording of the court's later order granting appellees' motion for summary judgment, it is clear that violation of the primary effect test remained the ground the court's decision:

> "[I]t appearing that more than 90% of the children attending nonpublic schools in the Commonwealth of Pennsylvania are enrolled in schools that are controlled by religious organizations or that have the purpose of propogating [*sic*] and promoting religious faith, and in accordance with our Opinion dated April 6, 1972, denying the motion[s] of the defendant[s] to dismiss, it is ORDERED as follows:
>
> "1. The motion of the plaintiffs for summary judgment is GRANTED;
>
> ". . . ." App. 87a.

Amici contend that the district court correctly analyzed the Pennsylvania statute and correctly determined that it violates the Establishment Clause of the First

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Amendment. We contend that the Act violates the neutrality principle in that its principal or primary effect is to advance religion by directly subsidizing a limited class of citizens consisting predominantly of parents who send their children to religious schools. It may well be that the Act is unconstitutional for one or more additional reasons under the Establishment Clause, but those issues we leave to others.

II. INCORPORATION OF THE PRIMARY EFFECT ARGUMENT IN THE NEA AMICUS BRIEF IN NO. 72-694

Amici have filed a brief with this Court in No. 72-694, *Committee for Public Education & Religious Liberty* v. *Nyquist*. That appeal challenges the constitutionality of the New York statute which provides for tax benefits for parents who have paid tuition for their children to attend nonprofit, nonpublic elementary and secondary schools in New York State. Our brief in support of appellants presents in detail the "primary effect" argument in the context of that statute and the circumstances of parochial school enrollment in New York State.[1]

It is our contention that the primary effect argument presented in that amicus brief is fully applicable to the Pennsylvania statute. First, for the purpose of the primary effect argument we see no critical difference between a statute which provides tax benefits for parents who pay tuition to nonpublic schools and one which provides direct payments to such a group of parents. Sec-

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[1] Fall 1970 enrollment figures for New York State showed that 84.3% of the nonpublic elementary and secondary school children were enrolled in Roman Catholic parochial schools. An additional 8.5% attended schools operated and controlled by other religious groups. Thus a total of 92.8% of the nonpublic school children attended religious schools. Amicus Brief for National Education Association *et al.*, No. 72-694, at 14.

ond, in Pennsylvania and New York the percentages of nonpublic school children attending religious schools is very nearly the same—close to 90%. For these two reasons, we hereby adopt the argument in our amicus brief in No. 72-694 as fully applicable to the Pennsylvania statute.

For the benefit of the Court, we present here an outline of the primary effect argument now in our amicus brief in No. 72-694, as it applies to this case.

(1) The class of persons directly benefited by the statute is the class of parents who have chosen to send their children to nonpublic schools. Compare NEA Brief (No. 72-694) at 16.

(2) Approximately 90% of the children attending nonpublic schools in Pennsylvania are in religious schools, and approximately 88% attend Roman Catholic parochial schools.[2] These figures are documented in Part III of

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[2] That an essential purpose of Roman Catholic parochial schools is the promotion of the Catholic faith is eloquently expressed in the following words of Bishop Joseph L. Bernardin, General Secretary of the U.S. Catholic Conference, Washington, D.C., in an address entitled "Catholic Education Serving a Troubled Society," published in Report of the Proceedings and Selected Addresses at the Sixty-Sixth Annual Convention of the National Catholic Educational Association, Detroit, Michigan, April 7-10, 1969, 66 NCEA Bulletin, No. 1, at 7, 9 (August 1969):

"It would be a tragic mistake if the Church in this country were suddenly to phase out most of its schools. I am firmly convinced that our schools have shown themselves to be an effective instrument in the fulfillment of the Church's teaching mission. I do not subscribe to the thesis that because conditions are different now from what they were when our schools were established, they are no longer needed at all. The purpose of our schools even in the past was much broader than that of simply 'protecting' the faith of our children in a sometimes religiously hostile environment. Catholic schools have been a source of vigorous Catholic life in the United States. Catholic educators have always maintained that a Catholic school is not one which teaches religion only during one period each day. Rather, the whole atmosphere of the school

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this brief, *infra*. Compare NEA Brief (No. 72-694) at 14-15, and note 1 *supra*.

(3) Hence, the class of persons directly benefiting from the statute is overwhelmingly a class of persons who have exercised a religious preference. Contrary to the assertion in the Brief of Appellants Diaz *et al.*, at 18, such a parent differs from "a recipient of public assistance in Pennsylvania, who . . . may pay over to a church the earmarked assistance which he receives." Public welfare assistance, typically, is conditioned on economic need and on ability and willingness to secure employment; tuition reimbursement payments are conditioned on sending one's children to nonpublic schools, the overwhelming majority of which are religious. Compare NEA Brief (No. 72-694) at 22-23.

---

is to be a Christian one, animated by a community of faith—the children, the teachers and the parents.

"Coupled with a living liturgy and parents alive to their responsibility as primary educators of their children, the Catholic school is a proven and powerful instrument for achieving the aim of religious education: to develop a living, personal faith, illuminating the knowledge which students gradually gain of the world, of life and of mankind.

"That philosophy is clearly evidenced in Vatican II's *Declaration on Christian Education*:

> *The Church's involvement in the field of education is demonstrated especially by the Catholic school. No less than other schools does the Catholic school pursue cultural goals and the natural development of youth. But it has several distinctive purposes. It aims to create for the school community an atmosphere enlivened by the gospel spirit of freedom and charity. It aims to help the adolescent in such a way that the development of his own personality will be matched by the growth of that new creation which he became by baptism. It strives to relate all human culture eventually to the news of salvation, so that the light of faith will illumine the knowledge which students gradually gain of the world, of life, and of mankind.* (C.F. [*sic*, misprint for "Cf."] *Declaration* #8)" (Italics in original.)

(4) The tuition reimbursement plan is intended to induce and encourage its recipients to continue to send their children to nonpublic schools. See Section 2(4) of the Pennsylvania Act:

> "Should parents of children now enrolled in nonpublic schools be forced by economic circumstances to transfer any substantial number of their children to public schools, an enormous added financial, education and administrative burden would be placed upon the public schools and upon the taxpayers of the State. . . . [T]herefore, parents who maintain students in nonpublic schools provide a vital service to the Commonwealth." App. 57a-58a.

There is no doubt that the direct financial subsidization will have the effect of tending to maintain nonpublic school enrollment. We agree with appellants that, strictly speaking, the parents are not a "conduit" for the transmission of funds to the nonpublic schools, insofar as this metaphor may suggest that the parents are obligated to spend the payments they receive on tuition for nonpublic schools. See Brief of Appellants Diaz *et al.*, at 16. As the statutory scheme is set up, however, no parent receives a payment unless he has sent his child to a nonpublic school and paid tuition to such a school. See Section 7 of the Act, App. 61a; compare NEA Brief (No. 72-694) at 16-17. The obvious effect of the plan, therefore, is to benefit the nonpublic schools by making it substantially less expensive for parents to send children to them. And, as the figures in paragraph (2) show, these nonpublic schools are overwhelmingly religious and, in particular, overwhelmingly Roman Catholic.

(5) An intended effect of the statute is financial benefit to the general class of taxpayers, through reduced educational costs to the Commonwealth. See Section 2(4), quoted *supra*. This is not a present or immediate effect of the statute, nor is it clear that it is a likely effect. See NEA Brief (No. 72-694) at 17-18.

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(6) Since the direct, immediate, and primary effect of the statute is to favor and promote religious schools in Pennsylvania, the statute violates the Establishment Clause of the First Amendment.

III. STATISTICS ON NONPUBLIC SCHOOL ENROLLMENT IN PENNSYLVANIA

The Brief for Appellant Crouter, in No. 72-620,[3] challenges the factual basis for the district court's assertion in its order granting summary judgment that

> "more than 90% of the children attending nonpublic schools in the Commonwealth of Pennsylvania are enrolled in schools that are controlled by religious organizations or that have the purpose of propogating [*sic*] and promoting religious faith . . . ." App. 87a.

Since such a factual statement is central to the appropriateness of the primary effect test in this case, amici submit that the Court may take judicial notice of the figures that appear in the following table:

Academic year	Total enrollment: All Pennsylvania nonpublic elementary & secondary schools	Enrollment in Pennsylvania Roman Catholic elementary & secondary schools	Roman Catholic enrollment as a percentage of total enrollment
1969-70	541,969[4]	497,071[5]	92%
1970-71	517,151[6]	470,105[7]	91%
1971-72	486,827[8]	430,790[9]	88%

[3] See Brief of Appellant Crouter at 26, 34, and 39-41.

[4] Bureau of Educational Statistics, Pennsylvania Department of Education, Statistical Report of the Secretary of Education for the School Year Ending June 30, 1971, Table 12, at p. 19 (Statistical Report Series No. 18, 1972).

[5] *Ibid.*

[6] *Ibid.*

[Footnotes continued on page 14]

We have not found complete published figures concerning other religious schools in Pennsylvania for the years in question, but it appears that their enrollment would amount to at least 2 per cent of the total nonpublic school enrollment.[10]

[Continued]

[7] National Catholic Educational Association, Research Department, U.S. Catholic Schools, 1971-72, Table 1-6 (1972). The Pennsylvania Statistical Report, *supra* note 4, gives 470,478 for this figure, but we have chosen the smaller figure for the table. No explanation for the discrepancy between the two sources is apparent.

[8] Bureau of Educational Statistics, Pennsylvania Department of Education, Projections: Selected Educational Statistics for Pennsylvania to 1981-82, Tables 3 & 4, at pp. 8 & 9 (1972). Table 3 gives 360,553 as the actual (not projected) enrollment of elementary students in nonpublic schools in the fall of 1971. Table 4 gives 126,274 as the actual enrollment of secondary students in nonpublic schools in the fall of 1971. The sum is the figure in the table. The Pennsylvania Statistical Report, *supra* note 4, the source for the earlier figures, stops with 1970-71.

A much larger figure for Pennsylvania nonpublic school enrollment in 1971-72—564,600—appears in the Digest of Educational Statistics, 1971, published in 1972 by the U.S. Department of Health, Education and Welfare (National Center for Educational Statistics, DHEW Publication No. (OE) 72-45, 1972). See Table 40, at p. 34. But the table is specifically entitled "*Estimated* enrollment in nonpublic elementary and secondary schools, by State: Fall 1971" (emphasis added), and the indicated source confirms that the figures are estimates. Since the Pennsylvania Department of Education statistics are specifically labeled "actual" rather than "projected," we submit that they are the reliable figures.

[9] U.S. Catholic Schools, 1971-72, *supra* note 7, Table 1-6.

[10] See Pennsylvania Statistical Report, *supra* note 4, Table 8, at pp. 12-13. This table, entitled "Summary of Census Enumeration of Children, by County, 1970-71—Part B—From Age Six Through Age Seventeen" gives 37,038 as the enrollment in nonsectarian nonpublic schools for the year in question, and 488,121 as the enrollment in sectarian nonpublic schools. Their total—525,159—is slightly more than the figure of 517,151 given in the table above, but no explanation for the discrepancy is apparent. By the figures in this Table 8, 93% of the Pennsylvania nonpublic school children in 1970-71 attended sectarian schools.

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In short, there is no material difference between New York and Pennsylvania in the percentages of school children enrolled in Roman Catholic and other religious schools.

CONCLUSION

Wherefore, the judgment of the district court should be affirmed insofar as it holds unconstitutional the Pennsylvania Parent Reimbursement Act for Nonpublic Education.

Respectfully submitted,

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MICHAEL RODAK, JR., C

IN THE

Supreme Court of the United States

October Term, 1972.

No. 72-450.

GRACE SLOAN, as State Treasurer of the Commonwealth of Pennsylvania,

and

JOSE DIAZ and ENILDA DIAZ, His Wife, WILLIAM ZIMMERSPITZ and NANCY ZIMMERSPITZ, His Wife, F. CARL KRETZMANN and KATHERYN L. KRETZMANN, His Wife, ARTHUR HARVEY and MURIEL HARVEY, His Wife, DANIEL P. X. POWELL and ANNA T. POWELL, His Wife, SETH W. WATSON, JR., and ANNE P. WATSON, His Wife, and HENRY E. CROUTER,

Appellants,

v.

ALTON J. LEMON, NEAL F. BRACKEN, and BENJAMIN S. LOWENSTEIN,

Appellees.

On Appeal From the United States District Court for the Eastern District of Pennsylvania.

REPLY BRIEF OF APPELLANTS JOSE DIAZ AND ENILDA DIAZ, HIS WIFE, WILLIAM ZIMMERSPITZ AND NANCY ZIMMERSPITZ, HIS WIFE, F. CARL KRETZMANN AND KATHERYN L. KRETZMANN, HIS WIFE, ARTHUR HARVEY AND MURIEL HARVEY, HIS WIFE, DANIEL F. X. POWELL AND ANNA T. POWELL, HIS WIFE, SETH W. WATSON, JR., AND ANNE P. WATSON, HIS WIFE.

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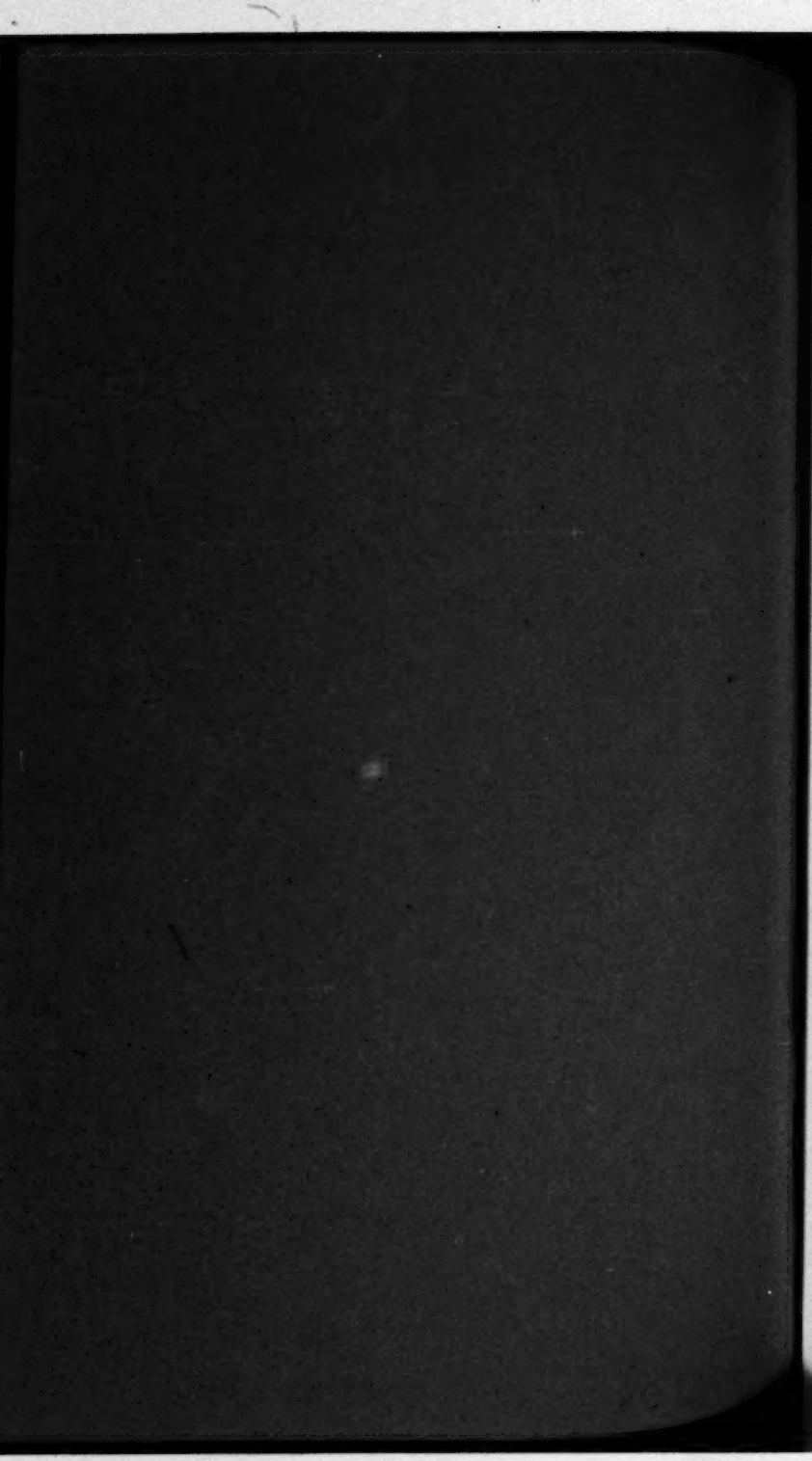

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ARGUMENT.

The Summary of Argument, at page 4 of Appellees' Brief, states their whole case. That case boils down to but two points:

1. The Act "helps parents advance religion".
2. The Act "fosters political entanglement and divisiveness".

Everything else in the Brief is an attempt to argue these two points.[1]

I. The First Point: "Helping Parents Advance Religion".

The Appellees' statement that "the Act was passed *before* the school year started", thus supposedly creating a "statutory promise" which "encouraged parents to enroll their children in non-public schools" (Brief 15) is grossly inaccurate and misleading. The Act was signed into law August 27, 1971—a few days before the school year started. Application forms for parents were issued long after that, the first forms requiring filing only on July 15, 1972 (A 86). It was incumbent upon all counsel to know these were issued only on May 15, 1972, *after* the school year was practically over. The whole "statutory promise" argument vanishes. Not even the Court below—zealous as it was to condemn the Act—ventured the remarkable notion of the "statutory promise".

Just as the Appellees have, by the foregoing, misrepresented the facts of this case, so have they transparently attempted to obscure the issues by polemic references to past religious history and by a long list of cases that are clearly not in point. They have utterly failed to meet our arguments.

---

1. The second and third Questions Presented by Appellees are not properly before the Court. The Order of the Court below, respecting these questions, was final (A 64). They were not raised by a cross appeal.

II. The Second Point: "Divisiveness".

The Appellees blow up out of all proportion this Court's remarks in *Lemon I,* regarding "political divisiveness". Those remarks must be read as confined to the facts there presented, namely, entanglement of government with religious *institutions.* They did not concern government and citizen welfare. The lower Court made no findings of "political divisiveness" and, indeed, made no reference to the matter.

The doctrine which Appellees seek to establish would not only be subversive of fundamental liberties, but would also fly in the face of constitutional tradition and precedents long insisted upon by this Court. It has never been constitutional doctrine to deny any group of citizens the rights of petition, franchise, speech, press and assembly, irrespective of how distasteful their views might be to other groups. See, *e.g., Cantwell v. Connecticut,* 310 U. S. 296 (1940). It has never been constitutional doctrine to suppress civil liberty at the vital point of its exercise by labelling it "politically divisive". Yet, Appellees would, in essence, have this Court promulgate this constitutionally subversive directive to the parents now before it:

> "Since you have dared to exercise your political liberty, and since some religious groups do not like what you have advocated, the legislation which you support must, *on that account,* be struck down as contrary to the Constitution."

Such an argument is a contrivance of the moment, never invoked until the recent appeals of Catholic citizens (united with a substantial number of Protestants and Orthodox Jews) seeking equity from their government. Such an argument, masked as constitutional probity, is at bottom, constitutionally malevolent.

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Absent the gloss of religious bias, no one would seriously contend that public assistance to disadvantaged Blacks should be outlawed because some groups choose to create political controversy along *racial* lines. Nor, we dare say, would Appellees carry their thesis forward to attack the commendable and humane federal Resettlement Act (P. L. 92-352, July 13, 1972) which authorizes the payment of $85 million of taxpayer funds, plus an appropriation of $50 million (P. L. 95-571, Oct. 26, 1972) to the State of Israel (a) to afford individual aid to refugees from *religious* discrimination in Russia, and (b) to assist the public ends of the state through the in-gathering of Jews. There are no restrictions in the Resettlement Act to prevent the use of the funds for religious, educational and other purposes useful to a state which is pervaded by an official and preferred religious establishment. Examples involving other religious establishments could be multiplied at length.[2] The doublethink constitutionalism advanced by Appellees promises divisiveness and menaces freedom in pluralistic America.

Aside from the grotesque suppression of constitutional liberty espoused by Appellees, the situation in Pennsylvania does not proximate the caricature presented by them. As our main brief points out, the challenged statute was passed by a vote of 132 to 63 in the State House and 32 to 12 in the State Senate. Instead of pointing out these votes and that they were cast on both sides of the aisle by members of all faiths, Appellees chose to avoid their burden of proving the alleged political divisiveness by seeking trial. Indeed they repeatedly made public appeals, labelling the issue as "Catholic" in a state wherein Catholics comprise 22% of the total population. Despite their self-

2. For a description of lobbying efforts and organized political pressure by religious groups, see *The New York Times,* April 6, 1973, p. 14.

serving complaints, the limited group of Appellees have no record either before this Court, or in the history of the legislation at bar, which can remotely suggest any serious political divisiveness concerning the passage and administration of the Act.

As the Brief for the United States as Amicus (p. 23) points out, the Parent Reimbursement Act has no "divisive political potential since no annual appropriations are involved in it and since it requires no exercise of discretion by state authorities in determining the size of payments to parents".

It is respectfully submitted that, apart from the meager record herein, this Court should summarily reject the Appellees' effort to shut their neighbors out of the public forum by use of the cudgel of "political divisiveness".

Respectfully submitted,

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NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

SLOAN, TREASURER OF PENNSYLVANIA, ET AL. *v.* LEMON ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

No. 72–459. Argued April 16, 1973—Decided June 25, 1973*

Subsequent to *Lemon* v. *Kurtzman*, 403 U. S. 602, Pennsylvania enacted the "Parent Reimbursement Act for Nonpublic Education," providing funds to reimburse parents for a portion of tuition expenses incurred in sending their children to nonpublic schools. The three-judge District Court held that the law violated the Establishment Clause, granted plaintiffs' motion for summary judgment, and permanently enjoined disbursement of any funds under the Act. The Court also indicated that "more than 90% of the children attending nonpublic schools in . . . Pennsylvania are enrolled in schools that are controlled by religious organizations or that have the purpose of propagating and promoting religious faith," and ruled that the Act could not properly be viewed as containing a separable provision for aid to parents whose children attended *nonsectarian*, nonpublic schools. *Held:*

1. There is no constitutionally significant difference between Pennsylvania's tuition grant scheme, with its intended consequence of preserving and supporting religion-oriented institutions, and New York's tuition reimbursement program held violative of the Establishment Clause in *Committee for Public Education & Religious Liberty* v. *Nyquist*, *ante*, p. —. Pp. 3–7.

2. The Act is not severable, but even if it were clearly severable, valid aid to nonpublic, nonsectarian schools can provide no basis for sustaining aid to sectarian schools. The Equal Protection Clause cannot be relied upon to sustain a program violative of the Establishment Clause. Pp. 8–9.

340 F. Supp. 1356, affirmed.

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*Together with No. 72–620, *Crouter* v. *Lemon et al.*, also on appeal from the same court.

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Syllabus

POWELL, J., delivered the opinion of the Court, in which DOUGLAS, BRENNAN, STEWART, MARSHALL, and BLACKMUN, JJ., joined. BURGER, C. J., filed a dissenting opinion, in which WHITE and REHNQUIST, JJ., joined. WHITE, J., filed a dissenting opinion, in which BURGER, C. J., and REHNQUIST, J., joined.

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SUPREME COURT OF THE UNITED STATES

Nos. 72–459 AND 72–620

Grace Sloan, as State Treasurer of the Commonwealth of Pennsylvania, et al., Appellants,
72–459 *v.*
Alton J. Lemon et al.

Henry E. Crouter, Appellant,
72–620 *v.*
Alton J. Lemon et al.

On Appeals from the United States District Court for the Eastern District of Pennsylvania.

[June 25, 1973]

MR. JUSTICE POWELL delivered the opinion of the Court.

On June 28, 1971, this Court handed down *Lemon* v. *Kurtzman*, 403 U. S. 602 (1971), in which Pennsylvania's "Nonpublic Elementary and Secondary Education Act" was held unconstitutional as violative of the Establishment Clause of the First Amendment. That law authorized the State to reimburse nonpublic, sectarian schools for their expenditures on teachers' salaries, textbooks, and instructional materials used in specified "secular" courses. The Court's ruling was premised on its determination that the restrictions and state supervision required to guarantee that the specified aid would benefit only the nonreligious activities of the school would foster "excessive entanglement" between government and religion. *Id.*, at 620–622.

On August 27, 1971, the Pennsylvania General Assembly promulgated a new aid law, entitled the "Parent

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Reimbursement Act for Nonpublic Education," providing funds to reimburse parents for a portion of tuition expenses incurred in sending their children to nonpublic schools. Shortly thereafter, this suit, challenging the enactment and seeking declaratory and injunctive relief, was filed in the United States District Court for the Eastern District of Pennsylvania. The plaintiffs were Pennsylvania residents and taxpayers who had paid the state tax used to finance the aid program, and at least one plaintiff was also the parent of a child attending a public school within the State. The State Treasurer was named as the defendant and was sued in that capacity. Motions to intervene on the side of the State were granted to a number of parents whose children were enrolled in nonpublic schools and who were therefore entitled to payments under the challenged law.

The defendant and intervenors filed a motion to dismiss the complaint for failure to state a claim upon which relief might be granted. The motion was considered by a properly constituted three-judge district court. On April 6, 1972, the panel denied the motion in a full opinion explicating its views and holding that the law violated the Establishment Clause. 340 F. Supp. 1356 (ED Pa. 1972). On the basis of that opinion, the District Court subsequently issued an order granting plaintiffs' motion for summary judgment and permanently enjoining the disbursement of any funds under the Act. Its order also ruled that the Act could not properly be viewed as containing a separable provision for aid to parents whose children attended *nonsectarian*, nonpublic schools.

Direct appeals were docketed in this Court by the State Treasurer and by the several intervenors.[1] We

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[1] No. 72–459, *Sloan* v. *Lemon*, is an appeal filed by the State Treasurer and by 12 intervening parents, two of whom are the

noted probable jurisdiction, consolidated the appeals for oral argument, and scheduled the cases to be argued with the several appeals in a case from New York involving an issue in common with this case. 410 U. S. 907 (1973). We have today held in *Committee for Public Education and Religious Liberty* v. *Nyquist, ante,* that New York's tuition reimbursement legislation has the impermissible effect of advancing religious institutions and is therefore unconstitutional under the Establishment Clause. Because we find no constitutionally significant difference between New York's and Pennsylvania's programs, that decision compels our affirmance of the District Court's decision here.

I

Pennsylvania's "Parent Reimbursement Act for Nonpublic Education"[2] provides for reimbursement to parents who pay tuition for their children to attend the State's nonpublic elementary and secondary schools. Qualifying parents are entitled to receive $75 for each dependent enrolled in an elementary school, and $150 for each dependent in a secondary school, unless that amount exceeds the amount of tuition actually paid. The money to fund this program is to be derived from a portion of the revenues from the State's tax on cigarette sales, and is to be administered by a five-member committee appointed by the Governor, known as the "Pennsylvania Parent Assistance Authority." In an effort to avoid the "entanglement" problem that flawed its prior aid statute, *Lemon* v. *Kurtzman, supra,* the

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Watsons—the parents of a child registered in a nonreligious, private school. No. 72–620, *Crouter* v. *Lemon,* is a separately docketed appeal initiated by another one of the intervenors.

[2] Law of Pa., 1971, Act 92, 24 Pa. Stat. Ann. §§ 5701–5709 (Supp. 1972) (the entire enactment is printed in an appendix to the District Court's opinion, 340 F. Supp., at 1365–1368).

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new legislation specifically precludes the administering authority from having any "direction, supervision or control over the policy determinations, personnel, curriculum, program of instruction or any other aspect of the administration or operation of any nonpublic school or schools." [3] Similarly, the statute imposes no restrictions or limitations on the uses to which the reimbursement allotments can be put by the qualifying parents.

Like the New York tuition program, the Pennsylvania law is prefaced by "legislative findings," which emphasize its underlying secular purposes: parents who send their children to nonpublic schools reduce the total cost of public education; "inflation, plus the sharply rising costs of education, now combine to place in jeopardy the ability of such parents fully to carry this burden"; if the State's 500,000 nonpublic school children were to transfer to the public schools, the annual operating costs to the State would be $400 million, and the added capital costs would exceed $1 billion; therefore, "parents who maintain students in nonpublic schools provide a vital service" and deserve at least partial reimbursement for alleviating an otherwise "intolerable public burden." [4] We certainly do not question now, any more than we did two Terms ago in *Lemon*,[5] the reality and legitimacy of Pennsylvania's secular purposes. See *Committee for*

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[3] *Id.*, § 5704.

[4] *Id.*, § 5702.

[5] These findings are similar to the ones which supported the Pennsylvania teacher-salary reimbursement law involved in *Lemon*. There the Court noted that the Act was passed "in response to a crisis that the Pennsylvania Legislature found existed in the State's nonpublic schools due to rapidly rising costs." *Id.*, at 609. The Court held that the State's interest in enhancing "the quality of secular education in all schools covered by the compulsory attendance laws" was clearly legitimate and "must therefore be accorded appropriate deference." *Id.*, at 613.

Public Education and Religious Liberty v. *Nyquist, ante,* at 15.

We turn, then, to consider the new law's effect. As the case was decided in the District Court initially on defendant's and intervenors' motions to dismiss, the court accepted as true plaintiffs' allegation with respect to the identifying characteristics of the schools qualifying under the Act. 340 F. Supp., at 1359. Those characteristics are largely the same as the ones used by the District Court to describe typical sectarian schools in New York. *Id.*, at 9–10. In its subsequent order granting summary judgment in plaintiffs' favor, the District Court indicated that "more than 90% of the children attending nonpublic schools in the Commonwealth of Pennsylvania are enrolled in schools that are controlled by religious organizations or that have the purpose of propagating and promoting religious faith." This finding is consistent with the evidence in *Lemon,* in which the Court noted that more than 96% of the children attending nonpublic schools in Pennsylvania in 1969 "attended church-related schools, and most of these schools are affiliated with the Roman Catholic church." 403 U. S., at 610.

For purposes of determining whether the Pennsylvania tuition reimbursement program has the impermissible effect of advancing religion, we find no constitutionally significant distinctions between this law and the one declared invalid today in *Nyquist.* Each authorizes the States to use tax-raised funds for tuition reimbursements payable to parents who send their children to nonpublic schools. Neither tells parents how they must spend the amount received. While the Pennsylvania grants are more generous ($75 to $150 as opposed to $50 to $100), and while Pennsylvania imposes no ceiling on the number of children for whom parents may claim tuition reimbursement or on the percentage of the tuition bill for

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which parents may be reimbursed,[6] these considerations are irrelevant to the First Amendment question.

Neither the State Treasurer nor appellant-intervenor in No. 72–620 has suggested any way in which the present law might be distinguished from the one in question in *Nyquist*. The intervenors in No. 72–459 have, however, proffered a distinction which deserves discussion because it serves to underline the basis for our ruling in these cases. Intervenors suggest that New York's law might be differentiated on the ground that, because tuition grants there were available only to parents in an extremely low income bracket (less than $5,000 of taxable income), it would be reasonable to predict that the grant would, in fact, be used to pay tuition, rendering the parent a mere "conduit" for public aid to religious schools. Since Pennsylvania authorizes grants to all parents of children in nonpublic schools—regardless of income level—it is argued that no such assumption can be made as to how individual parents will spend their reimbursed amounts.[7]

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[6] Since the grants in this case are not limited to reimbursing only a percentage of the tuition bill, the argument could not be made here that the law contains any "statistical guarantee of neutrality," *Nyquist, ante*, at 28.

[7] Brief of Appellants Diaz, et al., at 23–24. It was also alleged, as a ground of distinction between the Pennsylvania and New York tuition reimbursement grants, that there was less likelihood of political divisiveness under the Pennsylvania scheme because it is financed out of a self-perpetuating Fund derived from the state cigarette tax. Thus, it is contended that no annual appropriations are required and there will be less likelihood of divisive political pressure for increased grants and expanded aid. We addressed the problem of potential political divisiveness in Part III of our opinion in *Nyquist, ante*, at 35–38. At most, the difference here is one in degree and one not likely to diminish perceptibly over the long term the inevitable demands for increased and expanded aid.

Our decision, however, is not dependent upon any such speculation. Instead we look to the substance of the program, and no matter how it is characterized its effect remains the same. The State has singled out a class of its citizens for a special economic benefit. Whether that benefit be viewed as a simple tuition subsidy, as an incentive to parents to send their children to sectarian schools, or as a reward for having done so, at bottom its intended consequence is to preserve and support religion-oriented institutions. We think it plain that this is quite unlike the sort of "indirect" and "incidental" benefits that flowed to sectarian schools from programs aiding *all* parents by supplying bus transportation and secular textbooks for their children. Such benefits were carefully restricted to the purely secular side of church-affiliated institutions and provided no special aid for those who had chosen to support religious schools. Yet such aid approached the "verge" of the constitutionally impermissible. *Everson* v. *Board of Education*, 330 U. S. 1, 16 (1947). In *Lemon*, we declined to allow *Everson* to be used as the "platform for yet further steps" in granting assistance to "institutions whose legitimate needs are growing and whose interests have substantial political support." 403 U. S., at 624. Again today we decline to approach or overstep the "precipice" of establishment against which the Religion Clauses protect. We hold that Pennsylvania's tuition grant scheme violates the constitutional mandate against the "sponsorship" or "financial support" of religion or religious institutions. *Walz* v. *Tax Commission*, 397 U. S. 64, 68 (1970).[8]

[8] Appellants have also sought to distinguish *Nyquist* on the ground that Pennsylvania's legislation is more carefully drafted to avoid excessive administrative entanglements; the program is administered by an independent authority rather than by the Commissioner of

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II

Apart from the Establishment Clause issues central to this case, appellant-intervenors in No. 72–459 make an equal protection claim that was not directly ruled on by the District Court. These intervenors are 12 parents whose children attend nonpublic schools. Two parents, the Watsons, send their child to a nonsectarian school while the remainder send their children to sectarian schools. The District Court's final order enjoined the State Treasurer from disbursing funds to any parents, irrespective whether their children attended sectarian or nonsectarian schools. The court considered and rejected the argument that the state law should be treated "as containing a separate provision for aid to parents of children attending nonpublic schools that are not church related." [9] Although the Act contained a severability clause,[10] the court reasoned that, in view of the fact that so substantial a majority of the law's designated beneficiaries were affiliated with religious organizations, it could not be assumed that the state legislature would

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Education, and its funds are not derived from the general revenues available for education but from a separate fund. Brief of Appellant Diaz, et al., at 24. Since Pennsylvania's law falls under the second aspect of our test because its effect, inevitably, is to advance religion, we need not address this claimed distinction.

[9] Order of District Court, dated June 20, 1972, scheduling oral arguments on plaintiffs' summary judgment motion and outlining the questions to be argued at that time, reprinted in Appendix, at 84a–85a.

[10] "Section 10. Severability.—If a part of this act is invaild, all valid parts *that are severable* from the invalid part remain in effect. If a part of this act is invalid, in one or more of its applications, the part remains in effect in all valid applications *that are severable* from the invalid applications." 24 Pa. Stat. Ann. § 5710 (Supp. 1972) (emphasis supplied).

have passed the law to aid only those attending the relatively few nonsectarian schools.[11]

Appellants ask this Court to declare the provisions severable and thereby to allow tuition reimbursement for parents of children attending schools that are not church-related. If the parents of children who attend nonsectarian schools receive assistance, their argument continues, parents of children who attend sectarian schools are entitled to the same aid as a matter of equal protection. The argument is throughly spurious. In the first place, we have been shown no reason to upset the District Court's conclusion that aid to the nonsectarian could not be severed from aid to the sectarian. The statute nowhere sets up this suggested dichotomy between sectarian and nonsectarian schools, and to approve such a distinction here would be to create a program quite different from the one the legislature actually adopted. See *Champlin Refining Co.* v. *Corporation Commission of Oklahoma*, 286 U. S. 210, 234 (1932); cf. *Tilton* v. *Richardson*, 403 U. S. 672, 683–684 (1971) (plurality opinion). Even if the Act were clearly severable, valid aid to nonpublic, nonsectarian schools would provide no lever for aid to their sectarian counterparts. The Equal Protection Clause has never been regarded as a bludgeon with which to compel a State to violate other provisions of the Constitution. Having held that tuition reimbursements for the benefit of sectarian schools violate the Establishment Clause, nothing in the Equal Protection Clause will suffice to revive that program. Cf. *Brusca* v. *State Board of Education*, 405 U. S. 1050 (1972), aff'g 332 F. Supp. 275 (ED Mo. 1971).

[11] Final Order of District Court, dated July 21, 1972, permanently enjoining enforcement of the Act, reprinted in Appendix, at 870.

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III

In holding today that Pennsylvania's post-*Lemon* attempt to avoid the Establishment Clause's prohibition against government entanglements with religion has failed to satisfy the parallel bar against laws having a primary effect that advances religion, we are not unaware that appellants and those who have endeavored to formulate systems of state aid to nonpublic education may feel that the decisions of this Court have, indeed, presented them with the "insoluble paradox" to which MR. JUSTICE WHITE referred in his dissent in *Lemon*. 403 U. S., at 668.[12] But if novel forms of aid have not readily been sustained by this Court, the "fault" lies not with the doctrines which are said to create a paradox but rather with the Establishment Clause itself: "Congress" and the States by virtue of the Fourteenth Amendment "shall make no law respecting the establishment of religion." With that judgment we are not free to tamper, and while there is "room for play in the joints," *Walz* v. *Tax Commission, supra,* at 669, the Amendment's proscription clearly forecloses Pennsylvania's tuition reimbursement program.

Affirmed.

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[12] See also *Lemon* v. *Kurtzman*, 403 U. S., at 640 (DOUGLAS, J., concurring); *Lemon* v. *Kurtzman*, — U. S. —, — n. 3 (1973) (*Lemon II*).

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Supreme Court, U.S.
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MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

October Term, 1972.

No. 72-459.

GRACE SLOAN, as State Treasurer of the Commonwealth of Pennsylvania,

and

JOSE DIAZ and ENILDA DIAZ, His Wife, WILLIAM ZIMMERSPITZ and NANCY ZIMMERSPITZ, His Wife, F. CARL KRETZMANN and KATHERYN L. KRETZMANN, His Wife, ARTHUR HARVEY and MURIEL HARVEY, His Wife, DANIEL F. X. POWELL and ANNA T. POWELL, His Wife, SETH W. WATSON, JR., and ANNE P. WATSON, His Wife, and HENRY E. CROUTER,

Appellants,

v.

ALTON J. LEMON, NEAL F. BRACKEN, and BENJAMIN S. LOWENSTEIN,

Appellees.

On Appeal From the United States District Court for the Eastern District of Pennsylvania.

PETITION OF APPELLANTS FOR REHEARING.

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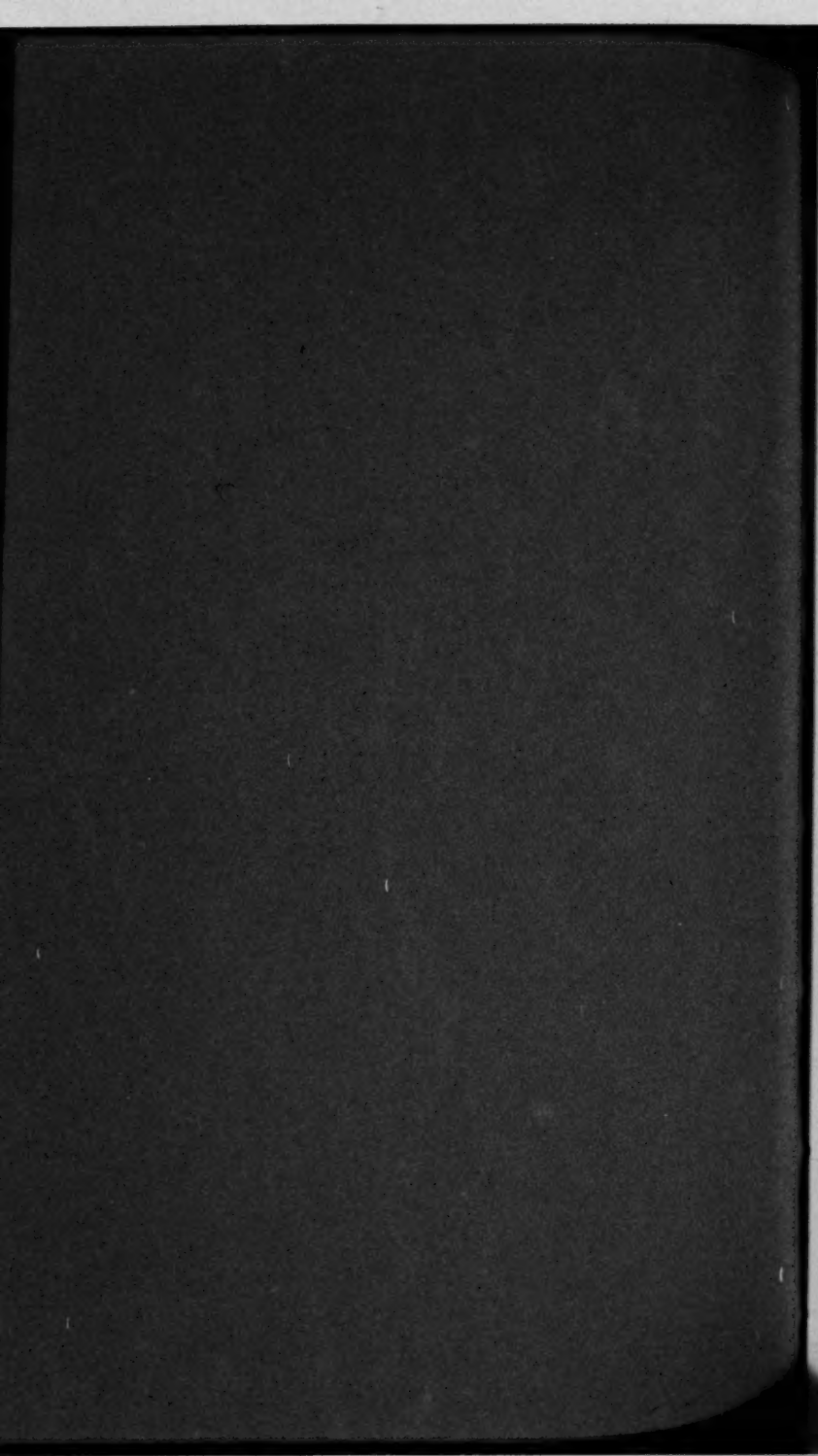

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972.

No. 72-459.

GRACE SLOAN, AS STATE TREASURER OF THE COMMONWEALTH OF PENNSYLVANIA,

AND

JOSE DIAZ AND ENILDA DIAZ, HIS WIFE, WILLIAM ZIMMERSPITZ AND NANCY ZIMMERSPITZ, HIS WIFE, F. CARL KRETZMANN AND KATHERYN L. KRETZMANN, HIS WIFE, ARTHUR HARVEY AND MURIEL HARVEY, HIS WIFE, DANIEL F. X. POWELL AND ANNA T. POWELL, HIS WIFE, SETH W. WATSON, JR., AND ANNE P. WATSON, HIS WIFE, AND HENRY E. CROUTER,

Appellants,

v.

ALTON J. LEMON, NEAL F. BRACKEN, AND BENJAMIN S. LOWENSTEIN,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

PETITION OF APPELLANTS FOR REHEARING.

Pursuant to Rule 58 of this Court, Appellants herein petition this Honorable Court for rehearing. The grounds for this petition are summarized as follows:

Rehearing is necessitated, not merely in the interests of justice in this case, but because basic conclusions and rationales stated in the majority opinion now leave the law in a state of confusion, with hazard, therefore, to the understanding of judges throughout the land and with resultant prejudice to future litigants. There are five points of such confusion, which go to the heart of this case, and which urgently call for resolution. These five points may best be stated as questions:

I. Is "religious division along political lines" a universal standard for constitutional adjudication, or is it a device applied *ad hoc* to the "parochial education aid" question?

II. When the Court says that a statute is void because, by it, *"The State has singled out a class of its citizens for a special economic benefit"*, (a) does the Court intend to overrule the long line of cases upholding special economic benefits to groups in our society who prove special disadvantage or need? (b) how does the Court square its claim that the statute specially benefits a class of *citizens* with its claim that the statute benefits *institutions*? (c) does the Court intend to rule, as a conclusion of law, that the qualifying acts of individual parents, in paying tuition at religiously affiliated schools, are not an *exercise of religion*?

III. Are not the parents of thousands of Pennsylvania children who attend *nonsectarian* nonpublic schools *expressly designated* beneficiaries of the Act, and, if so, can they be cut off from the benefits of the Act on the ground that they are *minority* beneficiaries?

IV. Does the Court intend to make inevitable a state educational monopoly and to rule that all American children except those of the rich shall be forced into a single public educational system?

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V. Should constitutional devices which were the inventions of 19th Century Nativism continue to be engrafted upon our law today?

I. If the "Religious Divisiveness" Charge Is a Universal Constitutional Principle, It Endangers the Religious Liberty of Everyone. If It Applies Only to the "Parochial Education" Question, It Attacks the Liberties of a Single Group.

As matters stand, the Court is telling millions of American citizens—whom the majority by inference identifies as mostly of a single religious faith—to stay out of the political forum and to refrain from exercising their most basic First Amendment liberties of speech, petition, press and assembly. The incredible assertion comes to this: *that even though a statute contains no constitutional infirmity whatsoever, it must nonetheless be declared unconstitutional on the extrinsic ground that, if it were upheld, some citizens would (or could, or might) decide to exercise First Amendment rights of speech, press, assembly and petition directed to the enactment of further legislation relating to the same area of concern.*

Merely to state such a proposition is to reveal its repressive character.

Such a doctrine has been unknown in the constitutional history of the United States.[1] Its sudden invoking at this time throws into bold contrast three centuries of American history during which majority religious groups in this

1. The chief source of this concept appears to be the often-cited article of Professor Freund, *Comment, Public Aid to Parochial Schools.* This article was originally delivered as a panel piece at an ABA summer meeting, then appeared in 82 Harv. Law Rev. 1680 (1969) and was finally given wide circulation in, a highly defamatory context, 74 *Case & Comment* (see Supplement C). The article cites to scant authority and is nothing other than a manifesto propagandizing the *personal views* of its author.

country preached, practiced and promoted "religious division along political lines" to the hilt.[2] Its invoking at this time, in the singular instance of what the Court calls the "parochial education" question throws into bold contrast the universal, varied and intensive *religious witness* (by no means confined to Catholics) in the United States today. If, as the Court says, *religious division along political lines* is the evil to be avoided, then campaigns *by religious groups* for or against the Prayer Amendment, legislation aimed at winning in or withdrawing from Vietnam, or relating to gambling, humane slaughter, welfare rights, drug abuse, governmental aid to Israel, Prohibition, trade with South Africa, Sunday Laws, conscientious objection, obscenity, "right to work" laws, etc.—all of which have created or are creating religious division along political lines, must —if they succeed—result in unconstitutional legislation.

The "divisiveness" doctrine is either an *ad hoc* device specially employed to help bury the "parochial aid" issue, or it is not. If it is the former, then it all too readily lends itself to the uses of those who delight to play upon sordid Nineteenth Century images of "the Catholic Power". But if it is not an *ad hoc* device—if the majority are interdicting, as *constitutional principle (therefore universal of application)*, "religious division along political lines"—then reargument is badly needed in this case in order that the implications of such doctrine can be fully explored.[3]

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2. See, generally, I A. Stokes, Church and State in the United States, 408-426, 833 (1950); II A. Stokes, Church and State in the United States, 3-61, 157-196, 275-285, 297-308 (1950); K. MacKenzie, The Robe and the Sword—The Methodist Church and the Rise of American Imperialism (1961); A. Sinclair, Era of Excess—A Social History of the Prohibition Movement (1962); M. and H. Josephson, Al Amith: Hero of the Cities, 350-400 (1969); P. Barrett, Religious Liberty and the American Presidency (1963).

3. In point of fact, in the instant case, the record is bare of one iota of evidence upon which the majority can possibly base its claim

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As matters stand, the Court appears to take one or both of the following positions:

—X seeks the passage of certain legislation.

—Y, who does not like the legislation, decides to turn the matter into a religious controversy.

—Therefore, when the legislation is enacted, the courts must strike it down as unconstitutional.

Another possible reading of the Court's position is as follows:

—Jewish groups lobby[4] for passage of the federal Resettlement Act (P. L. 92-352, July 13, 1972, P. L. 95-571, Oct. 26, 1972), which "singles out a class" (Jewish refugees) for a "special economic benefit" of $135 million of public funds.

—If the aid were to be upheld by the courts, it could be used as "the platform for yet further steps" in the form of "demands for increased and expanded aid" (Slip Op. 6, 7).

—Therefore, the Resettlement Act is unconstitutional.

The foregoing only slightly suggests the kinds of problems to which the "divisiveness" charge gives rise. If it is a principle of general application, it treads on the rights of all religious groups and persons. Is it intended instead as an *ad hoc* device for purposes of the "Catholic school question"?

May not the parent interveners here (standing for all similarly situated people in the country) have at least the

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3. (Cont'd.)
of "divisiveness". Judicial notice has no application here. Surely the Court cannot permit itself to construct constitutional doctrine upon *suspicion.*

4. See *The New York Times,* April 6, 1973, p. 14.

opportunity to thoroughly air the demeaning charge that they and others who, with decency, honor and peaceableness, exercise rights of petition in the public forum, have in any way produced "religious division along political lines"?

II. The Court Has Singled Out a *Religious Act* of the Parents as the Basis for Denying Them Public Welfare Benefits.

Reargument is plainly called for since the Court, for the first time in its history, has prejudicially classified citizens on the basis of their religion. The Court declares the basis defect of the statute in the following language:

> "The State has singled out a class of its citizens for a special economic benefit." Slip Op. 7.

A. The Court thus admits that the benefit of the statute is to *citizens.* The Court finds the Act defective in that it singles out a class of citizens for special economic benefit. By that reasoning public assistance to *any* group which has special need must be unconstitutional. This would include all programs for disadvantaged minorities. If it does not include such programs, then it is not a constitutional principle and cannot be used *ad hoc* to destroy the program of assistance rendered to parents in this peculiar instance.

B. Most of the Court's opinion is purely descriptive of the Act. Only at Page 7 of the Slip Opinion does the Court come to grips with *how* the Act, in its view, has a primary effect advancing religion. Not a word of the Court's opinion says that any money is paid, under the Act, to any sectarian institution. In fact, the Court, referring to both the New York and Pennsylvania tuition reimbursement statutes, says:

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"Neither tells the parents how they must spend the money received." Slip Op. 5.

The Court does not deny what we pointed out in our brief, namely, that *"no school may assert a claim for any money under the Act"*.

Therefore, to find "primary effect advancing religion", the Court is forced to say that *such effect takes place through the parents.* Here the Court leaves utterly in confusion its view of an important state enactment. The Court fails to make up its mind as to how to view the Act:

> "Whether that benefit [the benefit to 'citizens'] be viewed as a simple tuition subsidy, as an incentive to *parents* to send their children to sectarian schools, or as a reward for having done so, at bottom its intended consequence is to preserve and support religion-oriented *institutions.*" Slip Op. 7.

Whatever the Act may be, it is clearly *not* a "tuition subsidy". The Court admits that the Act is a reimbursement and that it does not tell the parents "how they must spend the money received".

If the Act is only "an incentive to parents to send their children to sectarian schools", it cannot therefore be said to constitute any such predictable support of sectarian schools as to have a "primary effect advancing religion".

If the Act is "a reward" to parents for sending their children to sectarian schools, that would be at most "an incentive" as discussed in the preceding paragraph.

This completely equivocal expression in respect to what a state enactment provides, and the validity of its provisions under the Constitution of the United States, alarmingly indicates a *haste to condemn.* Yet it leaves the constitutional law in a shakily uncertain state.

C. The Court should be willing to reconsider its extreme position whereby the *religious act* of a parent, in having *antecedently* supported his child's education in a religious school, is made the ground for denying that parent what are unassailably public welfare benefits. Since the Court pays not a word of heed to the elements of *conscience and religious concern*, which constitute the parent's motivation for having chosen a religious school for his child, surely the present special plea of parents to be more fully heard on this issue should not be ignored.

III. Parents of Children in Nonsectarian Schools Must Not Be Denied Benefits Because They Are *Minority* Beneficiaries of an Act Whose Application to Them Is Expressly Severable.

The magnitude of the injustice done by the majority to parents of children in religious schools is more fully seen when it is realized that denial of benefits to them becomes the pretext for denial of benefits even to those numerous parents of Pennsylvania children who are enrolled in nonsectarian schools.

How can the latter parents possibly have any Establishment Clause problem? The intervener defendants, Seth W. Watson, Jr. and Anne P. Watson, have a child at the Baldwin School, a famous and prestigious school which is *non*sectarian. Were the Watsons intended beneficiaries of the Act? "No", says the Court, in effect. "Catholics (or Catholic schools) were the intended beneficiaries. Since the Watsons are in a minority of the intended beneficiaries, they therefore get nothing".

The Court's attention is respectfully directed to Supplement A of this brief, the Order of the District Court in the first *Lemon v. Kurtzman* case, which expressly reserved to *nonsectarian schools* the benefits of the Act there inval-

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idated. Even the Appellees (in the present case) have admitted that the parents of children in nonsectarian schools should be entitled to the benefits of this Act.

The General Assembly, in Act 92, defines "nonpublic school" so as to include *any* nonpublic school.[5] This Court dare not rewrite that statute on the ground that "the state legislature would not have passed the law to aid only those attending the relatively few nonsectarian schools". A part of what the State legislature intended was what it expressly stated in the Act's severability clause. The Court nullifies the absolutely certain meaning of the deliberately chosen term, "nonpublic school", by also nullifying the plain language of the severability clause. That clause says:

> "If a part of this act is invalid, in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications."

Can it be denied that the Act could be applied to the Watsons? What bar to its administration, to the making out of checks to those beneficiaries, can be imagined? *How could such an application be invalid?* Would the payment to the parent of a child attending a nonsectarian school somehow encourage religion?

We respectfully ask the Court to understand that there are about 10,000 real-life Pennsylvania children enrolled in nonsectarian schools. To kill aid to these parents, on the ground that the Court presumes that a majority of the other designated beneficiaries are Catholics, is arbitrary in the extreme.

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5. Section 3(2) of the Act defines "nonpublic school" as "*any* school, other than a public school, within the Commonwealth of Pennsylvania, wherein a resident of the Commonwealth may legally fulfill the compulsory school attendance requirements of law and which meets the requirements of Title VI of the Civil Rights Act of 1964 (Public Law 88-352)."

IV. The Court Has Sentenced American Children to an Establishment of Public Education.

No aspect of the decision herein more strongly calls for reconsideration than the Court's evident intention to force all American children, save the very well to do, into public education. The inevitable conclusion to be read from the opinions of the majority in *Sloan* and *Nyquist* is this:

> *that every American child—with very few exceptions—should be required to be educated in the public schools.*

Justices Brennan, Marshall, Stewart and (with qualification) Douglas, in *Wisconsin v. Yoder*, —— U. S. ——, 32 L. Ed. 2d 15 (1972), agreed that an exception should be made in the case of Amish children. What the present majority appear not to perceive is that millions of parents are faced with a problem which, in substance, is not different from that faced by the Amish. Public education is not acceptable to great numbers of Catholic, Jewish and Protestant parents, and education for their children in a religious school is a matter of strict conscientious obligation to them.

The crude answer, "Then let them pay for such schools", is no answer at all in terms of (a) the needs of today's children in education, (b) inflation, taxation and educational costs, and (c) the demands of the religious conscience of parents. That answer confronts the religious conscience today with the same slapping effect as "Let them eat cake" did the poor of the *ancien régime*. As the Chief Justice stated in his dissenting opinion:

> "However sincere our collective protestations of the debt owed by the public generally to the parochial school system, the wholesome diversity they engender will not survive on expressions of good will."

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The six Justices' narrow and constricting reference to the *Everson* decision as a "5-4 decision" (which permitted boys and girls to be safely transported to school) and as "approaching the verge" of constitutional power, and the emphasis that the program upheld in *Allen* must be narrowly confined, disclose alarmingly a disposition to deprive large numbers of American children of any meaningful participation in the tax funds to which their parents contribute, solely on the ground that these children receive state-approved education in schools chosen by the dictates of religious conscience.

If "controversy" is what six Justices seek by their decision to suppress, this suppression, like all other unjust suppressions, will reap its own certain and explosive reaction. *Millions of religiously committed American parents are not going to see their children subjected to schooling in which prayer is silenced, in which the Ten Commandments as the Word of God may not be taught, in which religious values are relativized, and in which—backed by the power and prestige of the state—secular humanist, pagan and agnostic values are made to permeate the daily life of the classroom.*[6]

Since what is here involved reaches far beyond the narrow matter of payments to parents under the Act, and leads, instead, into the broad question of whether education shall become a state monopoly, rehearing is particularly called for.

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6. The splendid recent plea of Mr. Justice Powell before the American Bar Association for the return of "decency" and "respect for law" in American society triggers directly the disturbing question of how far civility, decency, non-violence and morality are going to be realized in a society in which virtually all children will be forced to spend their school time in schools where traditional precepts of God-centered morality may not be taught.

V. The History of American Church-State Relationships, as Expressed by the Majority, Calls for Reconsideration.

The majority rely upon a history of American church-state relationships which is far from factual. The effect conveyed is that the great American tradition was that of an almost total church-state separation, that the *Everson* and *Allen* decisions run almost contrary to that tradition, and that unearmarked tuition reimbursement to, or tax credits for, parents whose children attend religious schools would be totally contrary thereto. State aid to church-related educational institutions was common until the third quarter of the nineteenth century at the elementary and secondary level and has persisted at the college level down to the present. See, generally, Gabel, PUBLIC FUNDS FOR CHURCH AND PRIVATE SCHOOLS (1937). The Pennsylvania Laws of April 12, 1838, contained an express provision permitting the use of public funds for the support of schools "under the care and direction of a religious society." LAWS OF PENNSYLVANIA 1700-1849 (Dunlop), 849. The date of 1838 is significant, since by that year the tide of the Catholic immigration from Europe had not yet been felt in Pennsylvania, and the Commonwealth at that time had a very small Catholic population.

Mr. Justice Brennan's concurring opinion in *Lemon v. Kurtzman*, 403 U. S. 602, 647 (1971), devotes several pages to history, pointing to the "bitter controversy" which arose in New York over the question of aid to sectarian schools in 1842. The opinion then notes that "between 1840 and 1875, 19 states added provisions to their constitutions prohibiting the use of public school funds to aid sectarian schools" and that thereafter 16 more states also did. Again, the dates are significant, because it was precisely in the period roughly delimited by the years 1840 and 1875 that a *new* concept of church-state relations was forcefully

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engrafted by the dominant majority upon American public policy. That concept was as unknown to the Founding Fathers as were the conditions of a modern industrial America in which one-seventh of the school population attends parochial schools. That concept centered on *education*—the so-called "school question"—and history points with unmistakable thrust, at the origins of the "no aid to sectarian schools" concept. While the true intentions of the framers, in writing the Religion Clauses of the First Amendment, are indeed far from fully revealed by history,[7] the intentions of those who, by the state constitutional *amendments* originating at mid-nineteenth century sought to impose a new view of disestablishment, are crystal clear. A brief sketch of historical developments in Massachusetts, where the "no aid to sectarian schools" movement was born, and in New York, where the movement achieved its most substantial success in 1894, shows that the "bitter controversies" had their origin, not in the "aggressions of the sectaries" who (according to the current fiction) stirred up "divisiveness" and "controversy" by their "designs on the public treasury", but in a pervasive bigotry which willed the suppression of sincere claims of parental freedom and religious liberty. The attention of the Court is respectfully called to Supplement B hereto which sets forth a chapter of American history profoundly relevant to the issues at bar. The vital interests of millions of American parents, of the financially plagued Commonwealth, of the cities of Philadelphia, Pittsburgh, Scranton and Erie, and the stake which all have in federalism, education, freedom of the mind and religious liberty are too great to allow them

7. The simplicist view of the meaning of the Establishment Clause publicized by contemporary opponents of aid to church-related education has been widely rejected or held up to question. See Kauper, Religion and the Constitution (1964); Howe, The Garden and the Wilderness (1965); Katz, Religion and American Constitutions (1964).

to be struck down upon constitutional theories derived from a misreading of history.

Similarly a rehearing can serve an extremely important corrective function of calling into question occasional but significant resort by some of the Justices to sources respecting the Catholic Church and Catholic education which are either factually inaccurate (*e.g.*, the often cited work of Fichter, PAROCHIAL SCHOOL: A SOCIOLOGICAL STUDY) or which are of a character not deserving of citation by any judge of any court (*e.g.*, Mr. Justice Douglas' citation in *Kurtzman* I to L. BOETTNER, ROMAN CATHOLICISM (1962)) a defamatory tract as worthy of citation on the subject of Catholicism as would be articles in *Der Stürmer* by the late Julius Streicher on the subject of the Jews.

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CONCLUSION.

It is respectfully submitted that this Court should accord Appellants a rehearing herein.

Respectfully submitted,

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CERTIFICATE OF COUNSEL.

As counsel for the Petitioners, I hereby certify that this Petition for Rehearing is presented in good faith and not for delay.

/s/ WILLIAM BENTLEY BALL,
Counsel for Petitioners.

Dated: July 19, 1973.

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SUPPLEMENT A

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

CIVIL ACTION No. 69-1206.

ALTON J. LEMON, ET AL.

v.

DAVID H. KURTZMAN, ETC., ET AL.

ORDER.

AND NOW, this 28th day of December, 1971, upon motion of plaintiffs for summary judgment and permanent injunction, and on the basis of the decision of the United States Supreme Court in *Lemon v. Kurtzman*, dated June 28, 1971, 403 U. S. 602, IT IS HEREBY ORDERED that judgment be entered in favor of plaintiffs, with costs; and IT IS FURTHER ORDERED AND DECREED that the defendants, David H. Kurtzman, as Superintendent of Public Instruction, and Grace Sloan, as State Treasurer of the Commonwealth of Pennsylvania, are restrained and enjoined from making payments for services performed or costs incurred for any period subsequent to June 28, 1971, under and pursuant to Act 109, known as the Nonpublic Elementary and Secondary Educatior Act (24 P. S. § 5601-5609) to any school which is church related, controlled by a religious

organization or organizations, or has the purpose of propagating and promoting a particular religious faith and conducts its operations to fulfill that purpose.

By the Court,

William H. Hastie, *Circuit Judge.*
Alfred L. Luongo, *District Judge.*
E. Mac Troutman, *District Judge.*

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SUPPLEMENT B

MASSACHUSETTS:

Background of the Anti-Aid Amendment.

The Period of Establishment (1620-1833).

Education in Massachusetts, far from having come about as a secular development, nurtured by church-state separation, was born in the opposite principle of a hard-and-fast church-state union.[1] While civil control of most education in Massachusetts eventually supplanted church control, this education has been, for most of its 350 years, impressed, through state action, with marked religious—and sectarian—characteristics. During almost two centuries preceding the federal and Massachusetts constitutions, all Massachusetts education was intensively permeated with religion. The schools, in which this Bible-centered education was rendered, were at once "town" and Congregational Church schools. Due to the church-state union whereby the civil authority was obligated to promote religion,[2] and to the Calvinist concept of the ends of education, the conclusion must be regarded as correct that while the schools were, in a narrow sense, civil schools, they "remained virtually Congregational parochial schools for many years."[3] Correspondingly, general religious freedom in Massachusetts was unknown. "The absence of freedom of thought, especially on religious subjects, in seventeenth-century Massachusetts is so familiar a fact that a mere reminder should suffice."[4]

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[1] I Stokes, Church and State in the United States, 156 (1950).

[2] Smith, Religious Education in Massachusetts, 10 (1926).

[3] Gabel, Public Funds for Church and Private Schools, 51 (1937).

[4] Levy, Legacy of Suppression, 30 (1960).

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In contrast to religious liberty granted them in some of the other colonies, the Charter of Massachusetts Bay, October 7, 1691, while purporting to grant religious liberty to all, expressly excepted Roman Catholics.[5] In 1780 Massachusetts, now a state of the new nation, wrote its first constitution. The Declaration of Rights thereof contained several provisions here significant: Article II enjoined upon all the worship of God. (This provision is still a part of the constitution.) Article III provided express power to the legislature to exact public support of education in the established Protestant religion.[6] This provision is a striking reaffirmation of the union of church and state in Massachusetts, to remain as the fundamental law of the Commonwealth until almost half a century after the national ratification of the Bill of Rights (including the Establishment Clause of the First Amendment). To become modified in 1833, Article III set up in legal contradistinction Protestants and all other persons (of whom there would soon be many in Massachusetts) and awarded to the former a legally enforceable tax-supported dominance in education.

The Period of Protestant Hegemony (1833-1963).

Two main features characterized this period: the coming of the Catholic presence in the Massachusetts community and the effort to maintain Protestant predominance in education in Massachusetts—the latter becoming especially vigorous in response to the former. Both developments have combined to determine in large part the present con-

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[5] ". . . We do by these presents for us, our heirs and successors, grant, establish and ordain that for ever hereafter there shall be a liberty of conscience allowed in the worship of God to all Christians (except Papists) inhabiting or which shall inhabit or be resident within our said Province or Territory . . ." Thorpe, Federal and State Constitutions, 3.

[6] Journal of the Convention for Framing a Constitution of Government for the State of Massachusetts Bay, 223, 224 (1832).

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stitutional law relating to church-related education in the Commonwealth.

In 1789 the General Court had adopted a statute enjoining upon school instructors the duty of carrying into practice the principles stated in Article I of the 1780 constitution.[7] There has been much discussion as to why the heavily religious content of common schooling in Massachusetts gave way in considerable part to secular content between the period from the late 1820's to the end of the 1830's.[8] One of the reasons was undoubtedly the effect of the act of 1827 which provided, in part, that school committees might not direct school books to be purchased or used "which are calculated to favor any particular religious sect or tenet."[9] This was an outcropping of a sentiment for disestablishment which resulted in the deposing of Congregationalism as the State Church by constitutional amendment in 1833. But it was neither intended as a secularizing of the schools, nor as an opening to a general religious freedom.

As to secularization, it is clear from abundant testimony —soon to be eloquently reinforced by Horace Mann—that no such thing was intended. The view, instead, had come about, that a distinction could be made between "sectarian" doctrine, on the one hand, and general religious (including moral) instruction, on the other.[10] As to a general religious freedom, there was, at least in 1827, scarcely reason to believe that any religious bodies other than Protestant would be a significant factor in Massachusetts.

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[7] Laws of Massachusetts, 1788-1789, Acts 1789, c. 19, 417.

[8] See generally, Dunn, What Happened to Religious Education? 96-188 (1958); Cubberly, Public Education in the United States, 120-162 (1947).

[9] Laws of Massachusetts, X, c. CXLIII, 562-563.

[10] See the account of Mann's views in II Stokes, Church and State in the United States, 54 (1950).

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Here was a society in which almost all were Protestant, whose traditions were nothing but Protestant, and in which Protestant Christianity (without, now, its points of internal dogmatic difference) would predictably be taught for all the future in the schools. The rise of a Roman Catholic population in Massachusetts was soon seen as a direct challenge to what had been, until that rise, a universal Protestantism in that state.

The saturating anti-Catholic education given the Massachusetts populace for two centuries, in the school house, from the pulpit and in popular custom laid the great base of prejudice in the state from which all manner of hostile activity would inevitably arise, once the leaders and followers of the Roman Catholic Church actually entered Massachusetts' boundaries. A leading present-day Protestant scholar, Ray Allen Billington, describes this atmosphere:

> "An effective lecture series was founded at Harvard in 1750 by Paul Dudley 'for the detecting and convicting and exposing of the idolatry of the Romish church: their tyranny, usurpations, damnable heresies, fatal errors, abominable superstitions, and other crying wickedness in her high places.' These widely publicized speeches attracted much attention and were normally circulated in pamphlet form. Antipapal feeling was attested even in the everyday life of the colonies: one New England constable refused to publish a king's letter when he suspected that it tolerated Romanism and when singing was first permitted in a Connecticut service a deacon rushed from the church shouting 'Popery! Popery!' Even a game called 'Break the Pope's Neck' was a popular diversion around the New England firesides. School books such as the *New England Primer* were normally anti-Catholic in sentiment and were illustrated with grotesque pictures of the Pope, while by 1774 *A Master Key to Popery* and similar propaganda works were

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being advertised in America." Billington, The Protestant Crusade: A Study of the Origins of American Nativism, 16 (Quadrangle Books Ed., 1954).

If that body had been detested in its absence,[11] its physical presence triggered hatred unbounded.

There had been no Catholic church in Massachusetts until 1778.[12] In 1774 Massachusetts, commonly with the other colonies, had experienced a wave of anti-Catholic hostility with the passing of the Quebec Act by which Catholics in Quebec had been given the right to "have, hold, and enjoy the free exercise of the religion of the Church of Rome." Among the fears expressed was that of "their [Quebec's] members daily swelling with Catholic emigrants from Europe."[13] It was in the 1820's that Catholic emigrees became a notable factor in Massachusetts. Perhaps a natural distrust of foreigners, plus the serious increase in the population of the almshouses occasioned by these immigrants (mostly Catholic) made dry tinder for the fires of religious prejudice soon to reach consuming proportions in the No-Popery campaign which now appeared in the state and much of the rest of the East.

Just as Massachusetts' two centuries of anti-Catholic mind-set are essential to understanding of the "establishment" provisions of the Constitution of 1780 and of the No-Popery campaign which took hold in that state in the 1820's, so the latter becomes essential to an understanding of the ascendancy of the Know Nothing Party in the 1950's in Massachusetts, the peak of whose power was achieved precisely at the time the Constitutional Convention of 1853 was sitting. That convention wrote into the state constitution the first "anti-aid" amendment, Article

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[11] Billington, *ibid.*

[12] I Stokes, Church and State in the United States, 419 (1950).

[13] Stokes, *op. cit., supra,* at 786.

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XVIII, whereby, a mere twenty years since the Massachusetts Constitution had mandated public support of Protestant education, it now barred public support of any sectarian education. So much has the thinking of the 1853 Convention dominated subsequent sentiment in Massachusetts, that space is given here to chief points made in the debates.

Debate on the amendment began on July 29, 1853, Mr. Parker, of Cambridge, laying the foundation for its defense by stating:

> "Sir, this resolution has nothing sectarian in its character. It proposes simply to retain and secure your common schools in the condition in which they are at the present time, beyond all peradventure, come from what quarter an attempt for change may come—and I care not from what quarter it comes . . ."[14]

Mr. Keyes, of Abington, commented as follows, upon the thrust of the amendment:

> "Every-body knows this resolution appears to be aimed at one class of our citizens, one denomination of religion. Nobody has intimated any apprehension that money would be used for the benefit of Protestant sectarianism. I have never heard that question raised in the State; but the question has been raised in the State, and discussed, in relation to the support of Catholic schools; and I am not willing, as one of the friends of the Constitution, that it should be embarrassed by any such provision. It is too important a question to be passed over in this manner; without any reasons given for and against it; and impatient as we all are to finish our labors here, I hope the Convention will look seriously at this matter before they assent to its being made a part of the organic law."[15]

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[14] III Debates in the Massachusetts Convention, 614 (1853).

[15] *Id.* at 615.

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Mr. Wood, of Fitchburg, saw the public schools as sectarian-Protestant, and urged that Catholic schools should be as entitled to aid as such public schools:

"Many of the intelligent Irish do not and will not send their children to our schools. I had a conversation with one of these, a man who desires the advancement of learning as much as I or any man in the State. I asked him why he would not send to our schools. His answer was: 'I will not send my children to a sectarian school.' 'A sectarian school?' said I. 'Heavens! I did not know that our schools were sectarian.' 'Well,' said he, 'that is just the way with you here in America, and with religionists all over the world. Our sect is no sect; every-body else is sectarian. Now,' said he 'what constitutes a sectarian school? It is where you will have all the Protestant forms of worship introduced. You will insist on having prayers according to the Protestant forms. You introduce your Protestant Bibles and other Protestant books, and you will have none other. Now, I put it to you, would you be willing to send your children to be instructed by Roman Catholic priests; to be compelled to read their Bible, and have comments upon it?' I said 'No.' 'Very well, then, you ought not to expect us to do it.' Now, I put it to this Convention, how it is possible to raise any money by taxes to be expended for common schools, if it cannot be expended for either Protestant or Roman Catholic schools?

"Now, let me say another thing. It is all important that our Irish children should be educated. It is as important to us as it is to the Irish themselves. We do not want them to grow up amongst us, ignorant and vicious, first to rob our hen-roosts, and afterwards to commit more serious offences. It is all important that they should be educated. If we cannot educate

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> them in such schools as we have, let us give them such schools as they can accept." [16]

He regarded the proposal as a "law against a sect." [17]

Wood was answered by Mr. Lothrop, of Boston, who insisted that "the establishment of common schools, in which the great mass of the children of the community, of all religious denominations, are educated together, is the only way in which we can prevent and keep down sectarianism." [18] Thus was the dual concept of the melting pot and the nonsectarianism of sectarian-Protestant education advanced in the debates.

Much to the fore, in the minds of the anti-aid advocates, was the desirability of heading off, by timely action, the threat which they felt the growth of the Catholic numbers posed, although the historical record is bare of evidence of any troubles being encountered by the public schools of Massachusetts due to Catholics or, indeed, of any "drives" by Catholics for support of Catholic schools. Mr. Chapin, of Webster, a supporter of the anti-aid amendment, admitted as much when he warned that

> ". . . efforts have been made in other parts of the Union. New York and other States have been affected with excitement on the subject. And I think it would be well to consider whether, in this State, we are not approaching the same condition, and whether it is not our best policy, to guard against it in time." [19]

Mr. Butler renewed the opposition, declaring the amendment "the most sectarian resolution that can be brought

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[16] *Id.* at 616.

[17] *Id.* at 617.

[18] *Ibid.*

[19] *Id.* at 619.

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before a deliberative assembly."[20] He predicted that it would result in serious trouble for the future, bring a "controversy into the politics of this State." "We teach Protestantism," he said, ". . . But is that any reason why we should force it upon our neighbors?"[21]

Mr. Ball, of Upton, replied, with the plea: "Open your doors wide to all, and banish sectarianism from your schools, and Catholics will become Protestants through the influence of these schools."[22]

The vote taken on the motion to reconsider the amendment failed, 183 noes to 87 ayes.[23]

The careful documentation by Professor Billington of organized anti-Catholic bigotry in Massachusetts from 1800 to 1860 amply reveals the extreme virulence of that campaign and its extraordinary success in the Commonwealth.[24] The burning of the Ursuline convent at Charlestown, in 1834, was but the first in a series of acts of lawlessness to be perpetrated against Massachusetts Catholics prior to the Civil War. Describing the high tide of Know-Nothingism, Billington states that as a result of the fall elections of 1854: "Massachusetts was the scene of the party's greatest victories; there the governor and all state officers were Know-Nothings, the state Senate was made up entirely of representatives of that party, and the state House of Representatives was composed of one Whig, one Free Soiler and 376 Know-Nothings."[25]

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[20] *Id.* at 620.

[21] *Id.* at 621.

[22] *Id.* at 622.

[23] *Id.* at 626. And see discussion of the school fund II Debates in the Massachusetts Convention, 569-577 (1853).

[24] Billington, The Protestant Crusade (1938).

[25] Billington, *op. cit., supra,* 388.

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From the 1830's on, through the nineteenth century and well into the twentieth, there were many incidents of protests by Catholics over Protestant practices in public schools in which Catholic children were enrolled. These protests were uniformly turned back, sometimes upon the assumption that these were not "sectarian" practices, sometimes on the view that no evil resulted from a Catholic child's having to receive Protestant-oriented instruction, and sometimes upon both bases.[26] As Catholic population in the state grew, and, with this, the multiplication of Catholic schools,[27] pressures against public aid for these schools mounted.

While there exist statements that the object of Article XVIII was simply to preserve the common school system, by the turn of the century there was no doubt that the anti-aid principle had as its main focus the Catholic schools. Thus the question came again to be excited, with expressions of anxiety that Article XVIII was not a sufficient safeguard against the (always prospective) depredations of the Catholic populace upon the public treasury. An anti-aid measure, broader than Article XVIII, had been before the Massachusetts legislature for fourteen of the sixteen years between 1900 and 1916. It was agitated continually and intensively during that period as a "Roman Catholic" question. It was the chief spur to the calling of the Constitutional Convention of 1917.

Respecting that convention, one commentator has stated:

> "Through the official record cannot show the truth, yet the real cause of the collision over the anti-aid

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[26] Most instructive, in terms of presenting the prevailing attitude, is *Commonwealth* v. *Cooke*, 7 Am. L. Rep. 417 (1859).

[27] Gabel states that in 1886, the growth of private schools surpassed that of public schools in Massachusetts. He infers that this was due to the increase in Catholic schools. Gabel, Public Funds for Church and Private Schools.

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amendment was the antagonism of Catholic and Protestant. Years of struggle had occurred over legislative aid to Carney Hospital. Many Protestants feared, with the growing strength oi the Catholics, that the latter would become a majority in political power and then would come appropriations of public money to parochial schools. This anti-aid amendment came at this juncture. It had some Catholic support in the convention." [28]

The first large scale debate at the Convention concerned the broadening of the anti-aid provision. Edwin U. Curtis, of Boston, offered the so-called Curtis-Lomasney Amendment, as a 46th Amendment to supplant Article XVIII. He stated that, had the framers of the latter known how much money would be spent on private institutions following 1853, they would have assured that no sectarian institution in the state would have been eligible for aid.[29]

Bishop Frederick L. Anderson, of the Newton Theological School, informed the Convention that 100,000 members of various "patriotic orders" supported the amendment. These orders, and, in chief, a group known as clerically oriented "Minute Men" constituted the shock troops whose aim was to storm public opinion in favor of the proposal:

"The agitation in favor of the anti-sectarian amendment has been carried on for several years by an or-

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[28] Bridgman, the Massachusetts Constitutional Convention of 1917, iv (1923).

[29] I Debates of the Constitutional Convention 1917-1919, 67-68. Of the nearly seven million dollars paid by the Commonwealth to educational and charitable institutions from 1860 to 1899, Catholic charitable enterprises were reported to have received $49,000 and Catholic educational facilities nothing. *Id.* at 176. See also II Bulletins of the Constitutional Convention 1917-1919, 60-79. After 1899 even the charitable institutions received nothing. It was stated that during the past half century the educational institutions receiving state aid included institutions engaged in the training of sectarian ministers.

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Massachusetts Council of Churches urged approval.[37] The amendment was adopted that day by a vote of 206,329 in favor and 130,357 opposed.

NEW YORK:

BACKGROUND OF THE BLAINE AMENDMENT

The New York Constitutional Convention of 1894 cannot be understood except in the context of the history which preceded it. A highly visible issue in the convention was the question of imposing the constitutional prohibition which became the Blaine Amendment. While this was officially spoken of as the question of "aid to sectarian schools," it was popularly discussed and considered to be "the Catholic question."

The subject of the Church of Rome and Roman Catholics had been a deeply rooted, traditional preoccupation of a large majority of Americans in the colonies and in the nineteenth century republic. It had two foci: the fear of "Popery" and (especially after 1820) the fear of the immigrant. As Canon Stokes has stated, speaking of the anti-Catholic "Nativist" movement which thereafter swept the East Coast: "* * * it was the Roman Catholic 'foreigner' as the supposed emissary of the Pope that chiefly aroused the rabble."[38] The Know-Nothing Party, at mid-century, spearheaded this sentiment with immense political success. This party had its origin in New York City. Its Almanac stated its purpose:

> "Anti-Romanism, Anti-Bedinism, Anti-Pope's Toeism, Anti-Nuneryism, Anti-Winking Virginism, Anti-Jesuitism, and Anti-the-Whole-Sacredotol-Hierarchism with all its humbugging mummeries. Know-Nothingism is for light, liberty, education, absolute freedom

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[37] Boston Globe, November 6, 1917, p. 2.

[38] A. Stokes, I Church and State in the United States, 83 (1950).

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of conscience, with a strong devotion to one's native soil." [39]

The success of this movement in New York, and its unremitting propaganda efforts up to the opening of the Civil War, laid a foundation in inherited family attitudes and popular consciousness which was to have marked effect in the postbellum decades.[40] While an important irritant, prior to the Civil War, in which the anti-Catholic and anti-immigrant sentiments had been intermixed was the burden upon public charities which the newly arrived, often indigent, aliens produced, an equally potent irritant, following the Civil War, was the education question.

The New York tradition in education had been, from the Dutch colonization forward, a religious tradition. When the common schools emerged in the mid-nineteenth century they were "as devoted to religious as to secular instruction." [41] The religious instruction was Protestant

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[39] Clinchy, Everett, R., All in the Name of God, 69, 70, as quoted in Stokes, *supra*, 838.

[40] These attitudes are described by Ray Allen Billington:

"All types of reading matter were utilized by those who employed the printed word to shower calumny on Catholicism. Children whose primary instruction was from one of the primers in common use were accustomed to crude engravings of Protestant martyrs and to sentiments placing Popery in alignment with heathenism and infidelity. Infant minds were shaped to believe that 'to be a Catholic, was to be a false, cruel and bloody wretch,' and that Popery included everything that was vicious and vile. The school training was often supplemented by parental instruction, for the women of America embraced the No-Popery cause with more enthusiasm than the men. Sincerely believing that their prejudice should be shared by their offspring, they instilled into their children an enduring hatred of Catholicism." R. A. Billington, the Protestant Crusade, 347 (Quadrangle Books ed., 1964).

[41] J. Pratt, Religion, Politics, and Diversity, 164 (1967).

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—eventually a "nondenominational" Protestantism being the basis of the religious and moral training.

As early as 1840, Catholic citizens, unable in conscience to accept this kind of education for their children, increased their efforts to found their own schools and to obtain public aid for them. These efforts—augmented following the Civil War—met with stout resistance from the dominant Protestant majority and were repulsed, except for a few short-lived accommodations.[42]

A strong counter-agitation on the education question ensued, soon blending with an intensely revived campaign of propaganda, which, while centered on that question, manifested a far broader anti-Catholic hostility, denunciatory of the danger of "Papists in all the high places of the nation, with the control of cities and states, our Sabbath abolished, our educational system in ruins, Romanism established, and sustained by law * * * our religious freedom gone."[43]

This campaign built up to a peak in the decade immediately preceding the Constitutional Convention of 1894. The work of the convention, in its drafting and adopting of Article XI-3,[44] cannot be realistically appraised except in relation to that movement which, indeed, found its culminating expression in that provision.[45]

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[42] See generally, Pratt, *supra*, 158-203.

[43] From Mtehodist Quarterly Review, L. (1868) 531, as quoted in Pratt, *supra*, 202.

[44] The original numbering of the provision was Article 9, section 4, the present numbering having been adopted in 1938. The present numbering is employed, for purposes of clarity, throughout this article.

[45] The two chief organizations in New York which conducted the propaganda were the Central Committee for Protecting and Perpetuating the Separation of Church and State, to which generous and prestigious sponsorship was given by John Jacob Astor, John D. Rockefeller and Cornelius Vanderbilt, and the American

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A logical resultant of the pressures thus built up was a twofold focus of the discussions in the convention: (a) that there should now be established a constitutional bar, prohibiting public grants to sectarian educational institutions; (b) that the vice of all such grants lay simply in the nature of the institution as sectarian.

As to the first point of focus, its extremely *negative* character is to be noted. The dominant sentiment which swept to triumph in the convention was not upon *whether* the serious economic and moral problem in education faced by millions of Catholic citizens might be solved through some accommodation, respecting their schools, which would also protect the public interest. Rather, the sentiment was that of slamming the door in the face of imminent and mortal threat. This, in turn, accounts for

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Protective Association. The latter was a nationwide organization. The foremost authority on the "A. P. A.," Professor Donald L. Kinzer, states that its national influence peaked in the years 1893-1895. D. Kinzer, an Episode in Anti-Catholicism: The American Protective Association, 95-212 (1964). In 1894 the A. P. A. wielded a powerful influence in the State of New York. *Id.* at 145-147. Pratt relates that in the Convention, "the spearhead of the anti-Catholic thrust was the National League for the Protection of American Institutions, whose New York backers included J. P. Morgan, Cornelius Vanderbilt, Cyrus W. Field and John D. Rockefeller." Pratt, *supra*, 229-231 (1967). As each of these organizations was the direct descendant of the Nativist movement and the Know-Nothing Party, so each—with its casting of suspicion upon the citizenship and trustworthiness of Catholics and their Church leaders, its effort to promote hysteria over the threat which Catholic schools were said to pose to public education, and its violent appeal to latent, and sincere family-nurtured hostility to Catholicism—sowed the seeds which would find expression, in the new century, in the sordid excitements to be engendered through the Ku Klux Klan, POAU, the Smith campaign of 1928 and the Kennedy campaign of 1960. See W. Randall, The Ku Klux Klan: A Century of Infamy (1965); G. Myers, History of Bigotry in the United States, 140-295 (1943); L. Creedon and W. Falcon, United for Separation (1959); II A. Stokes, Church and State in the United States, 331-333, 406-410 (1950); M. and H. Josephson, Al Smith: Hero of the Cities, 350-400 (1969); P. Barrett, Religious Liberty and the American Presidency (1963).

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the second point of focus: consideration of the public functions of sectarian educational institutions were dismissed as beyond the pale.

Nothing is found in the convention records to indicate that any serious discussion was had of the social value or public benefits conferred upon New York society by her sectarian schools. One thing alone mattered: that they were sectarian educational institutions. Or rather what mattered was that these sectarian educational institutions were mainly *Roman Catholic*. That, unhappily, is the unanswerable testimony of the historical record.

While there was but a handful of sectarian schools in New York that were not Catholic, Protestant and Jewish welfare institutions were numerous—especially the former. And herein is found further testimony to the specifically anti-Catholic thrust of the convention in relation to the education question, as contrasted with the "charities" question. While the convention adopted Article XI, section 3, as its answer to the education question, it adopted Article VIII, section 1,[46] as its answer to the charities question.

Professor Pratt reports the argument of the Republican delegate, George Bliss, in favor of nonapplication of Article XI-3's church-state separation principle to charities:

> "Bliss went on to say that 'no money is taken [by virtue of Article VIII-1] from the State Treasury or City Treasury in aid of any denominational or ecclesiastical body • • • [or] for the

[46] "• • • nothing in this constitution contained shall prevent a county, city, or town from making such provision for the aid, care and support of the needy as may be authorized by law, nor prevent any such county, city or town from providing for the care, support, maintenance and secular education of inmates of orphan asylums, homes for dependent children or correctional institutions and of children placed in family homes by authorized agencies, whether under public or private control, or from providing health and welfare services for all children. • • •"

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dissemination of tenets of any religious body.' Public aid to sectarian charities went for services actually performed, and for nothing else. 'The money appropriated is certainly, so far as Catholic institutions are concerned, appropriated for the support of those who are in them and whom the State would have to support, if not in those institutions, then elsewhere.' The system of public aid, originally begun to assist Protestant orphan asylums in 1849, was now widely accepted as humane and necessary and should not be overturned for transient reasons. 'In an economical point of view it helps the State by throwing upon private benevolence a portion of the expense which otherwise would fall wholly upon the State.' Bliss returned to this economy argument again and again. He also stressed the humanitarian theme: the present system of charitable grants 'gives to the wards of the State the advantage of the private care—of the personal interest—which cannot be got in an institution managed by officers of the State.'' [47]

The Bliss statement (which came to represent the consensus) is notworthy. It first says that public expenditure for church-related welfare organizations is not ''in aid of any denominational or ecclesiastical body.'' That is to say nothing other than that public moneys may flow to a religious institution without having any necessary effect of aiding its sponsoring church qua church.

This is an especially important observation in view of the fact that the church-related welfare institutions, of which the new ''charities'' Article VIII-1 took cognizance, carried on [48] extensive educational functions, and in view of the further fact that the Protestant charitable institutions (particularly those devoted to child care and delinquent females) were famous for the zeal with which

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[47] Pratt, *supra*, 249-250 (1967).

[48] And still do.

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they sought to inculcate Protestant religious and moral teachings. Bliss's statement that no public money would, under Article VIII-1, be "for the dissemination of tenets of any religious body" flew in the face of the obvious fact that *all* religiously affiliated welfare agencies carry out religious as well as secular educational functions.

Indeed, the new Article VIII-1 expressly recognized this fact with its careful specification of "*secular* education of inmates of orphan asylums, homes for dependent children" • • • (etc.). In the Bliss statement we see an insouciant word-play, attempting to create a constitutional distinction between "welfare" and "education"—a confusion which has been perpetuated to the present by a few commentators opposed to meaningful aid to educational endeavors of parochial schools.[49]

As described by Bliss, the "secular educational function" of a church-related social institution is publicly supportable. As paraphrased by Professor Pratt: "Public aid to sectarian charities went for *services actually performed*, and for nothing else." (Emphasis supplied.) The secular educational function was thus deemed separable, for purposes of public support, from the religious function.

Two further concepts of towering importance appear in the Bliss statement: (1) the *public* interest served through savings effected to the State by the sectarian social agency; (2) the public interest in preserving meaningful individual freedom of choice in a pluralism of private institutional options ("• • • gives to the wards of the State the advantage of the private care—of the personal interest —which cannot be got in an institution managed by officers of the State").

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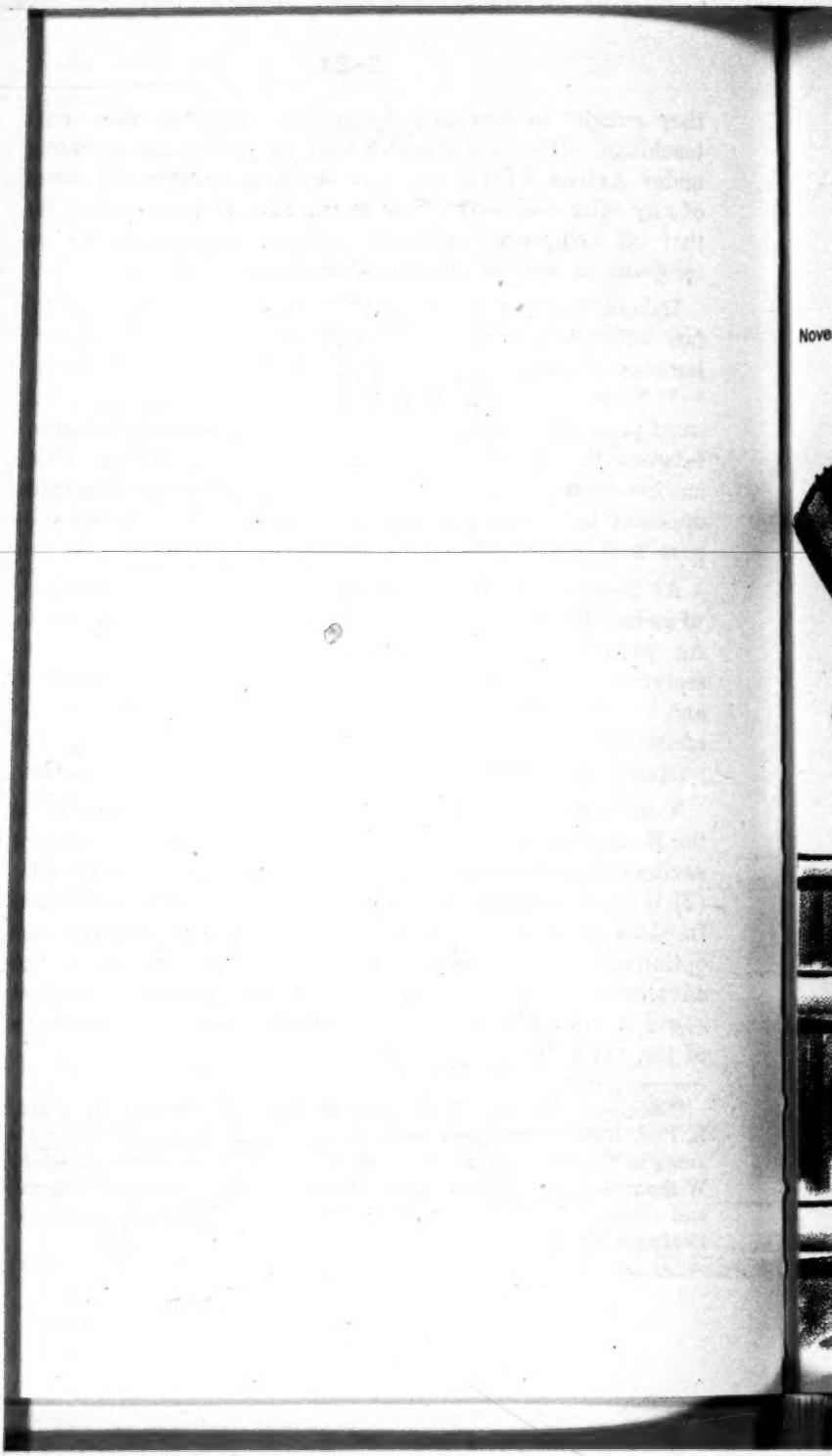
[49] See, e.g., Freund, Public Aid to Parochial Schools, 82 Harv. L. Rev. 1680 (1969), and note comment upon Professor Freund's views in Valente, Aid to Church-Related Education—New Directors Without Dogma, 55 Va. L. Rev. 579, 601 (1969). See also Valente and Stanmeyer, Public Aid to Parochial Schools—A Reply to Professor Freund, 59 GTWN, L. J. 59 (1970).



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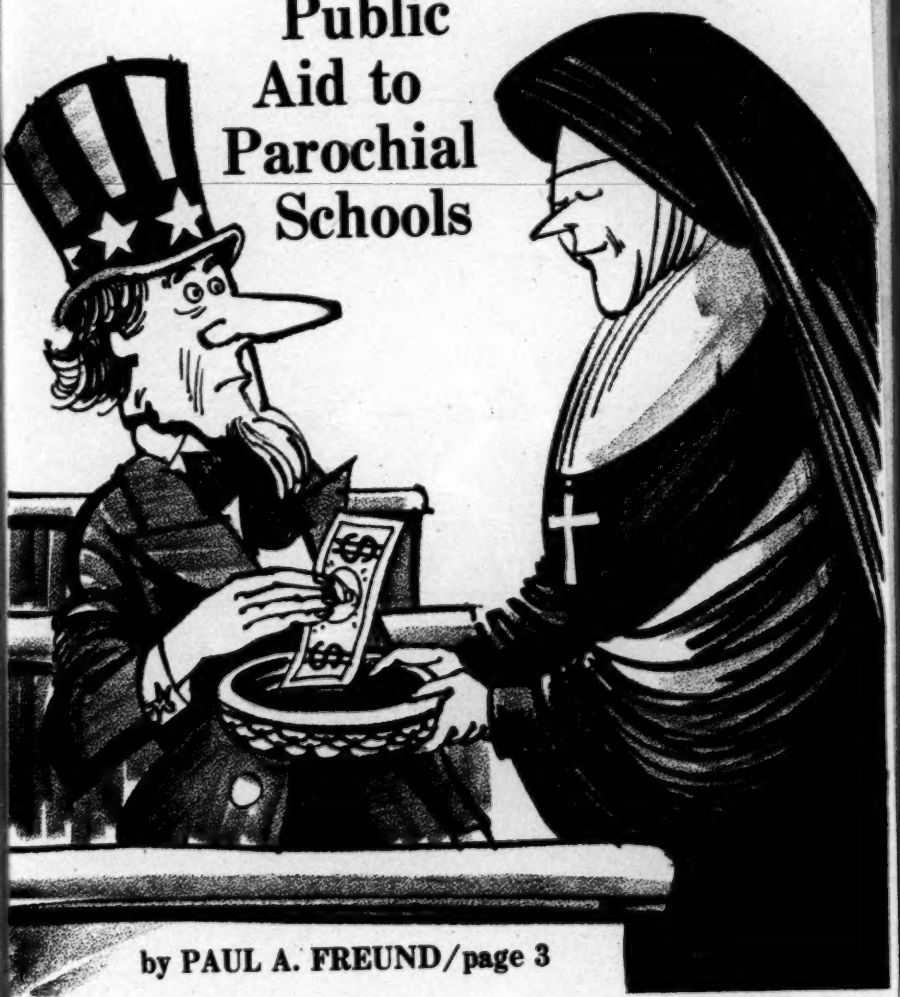

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